United Nations A/CN.4/491/Add.4

General Assembly

Distr.: General
2 July 1998
English
Original: French

International Law Commission
Fiftieth session
Geneva, 20 April–12 June 1998
New York, 27 July–14 August 1998

Third report on reservations to treaties

by Mr. Alain Pellet, Special Rapporteur

Addendum

Contents

		Paragraphs	Page
II.	Definition of reservations to treaties (and of interpretative declarations)		
3.	The distinction between reservations and interpretative declarations	236–421	3
(a)	Frequency of interpretative declarations	236–239	3
(b)	Usefulness of the distinction	240–247	5
(i)	The difficulty in distinguishing between reservations and interpretative declarations	248–266	6
a.	Obstacles arising from the variety of reasons that lead States to make interpretative declarations	249–256	6
b.	Obstacles arising from unclear terminology	257–266	9
(ii)	The definition of interpretative declarations	267–385	11
a.	Interpretative declarations in the light of the definition of reservations	268–346	11
i.	Elements common to the definitions of reservations and interpretative declarations	270–301	12
ii.	The teleological factor, a criterion for distinguishing between interpretative declarations and reservations	302–335	20

98-19382 (E) 230798 250798

iii. The temporal element of the definition 336–346

(iii) The proposed definition and its consequences 347–385

a. The proposed definition 348–363

b. The distinction between interpretative declarations and other unilateral declarations made in respect of a treaty 364–385

(c) Putting the distinction into action 386–414

(i) Stating the problem – the "double test" 389–399

(ii) The prescribed methodology 400–414

(d) Conclusion of section 1 415–421

3. The distinction between reservations and interpretative declarations

(a) Frequency of interpretative declarations

236. Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; these declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations.

237. The long-standing practice of such declarations has been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together "in a general instrument" all treaties concluded in the wake of Napoleon's defeat.[346] With this initial appearance of the multilateral format came both a reservation[347] and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be "understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Bonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government".[348]

238. This practice developed as the number of multilateral conventions on increasingly numerous, varied and sensitive topics grew.[349] Today it has become extremely common – one might almost say systematic, at least in certain areas such as human rights or disarmament.

239. The table below was compiled on the basis of replies from States to the questionnaire on reservations. It has absolutely no scientific value,[350] but it is interesting nonetheless in that it empirically establishes the extent of this phenomenon: interpretative declarations are as widely used as reservations.[351]

---

[346] Suzanne Bastid, *Les traités dans la vie internationale – Conclusion et effets* (Paris, Économica, 1985), p. 25.

[347] That of Sweden to the provisions relating to sovereignty over the duchy and principality of Lucca; see William W. Bishop Jr., *Recueil des cours de l'Académie du Droit International 1961-II*, vol. 103, pp. 261-262.

[348] W. Bishop Jr. views this declaration as a reservation (ibid., p. 262); it would seem more accurate to consider it an interpretative declaration (see, in this sense, Rosario Sapienza, who makes a careful analysis of the text of the declaration and its context: *Dichiarazioni interpretative unilaterali e trattati internazionali*, Milan, Giuffrè, 1996, pp. 28-34).

[349] Cf. Rosario Sapienza, op. cit., pp. 8-9.

[350] It draws a comparison between the responses to question 3.1 ("Has the State attached any interpretative declarations to the expression of its consent to be bound by the multilateral treaties to which it is a party? (Please list those treaties and provide the text of the declarations)") and 1.2 (a comparable question pertaining to reservations). Not all States that responded to the questionnaire answered these questions (in which case they were omitted from the list), and those that did answer them did not necessarily furnish an exhaustive list of their reservations and declarations; what is more, States did not always specify the criteria they used in making such a distinction.

[351] None of the international organizations that responded to the questionnaire claimed to have made a reservation or a declaration to a treaty to which they were party. This finding is not terribly significant: those organizations having the possibility of becoming parties to multilateral treaties are essentially integration organizations, yet the most important among them, the European Communities, did not, unfortunately, respond to the questionnaire at this time. In principle, the European Communities do not appear to have attached any reservations to their consent to be bound by such treaties. They have, however, made interpretative declarations when signing or expressing their consent to be bound. (See, for example, the declaration made to the Convention on Environmental Impact Assessment in a

States	*Interpretative declarations*	*Reservations*
1. Argentina	19	13
2. Bolivia	10	2
3. Canada	23	—
4. Chile	10	7
5. Colombia	—	4
6. Croatia	3	1
7. Denmark	2	36
8. Ecuador	1	1
9. Estonia	5	10
10. Finland	5	28
11. France	46	24
12. Germany	11	—
13. Holy See	2	2
14. India	8	—
15. Israel	1	10
16. Japan	5	12
17. Korea (Republic of)	5	14
18. Kuwait	2	—
19. Malaysia	6	3
20. Mexico	25	19
21. Panama	1	—
22. Peru	1	9
23. San Marino	—	1
24. Slovakia	1	—
25. Slovenia	2	3
26. Spain	71	37
27. Sweden	7	22
28. Switzerland	16	48
29. United Kingdom	—	45
30. United States of America	28	—

Transboundary Context of 25 February 1991 "1. The *Community* states that it is signing this Convention on the understanding that, in their mutual relations, the Community Member States will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules. 2. The *Community* considers that, if the information of the public of the Party of origin takes place when the environmental impact assessment documentation is available, the information of the affected Party by the Party of origin must be implemented simultaneously at the latest. The Community considers that the Convention implies that each Party must assure, on its territory, that the public is provided with the environmental impact assessment documentation, that it is informed and that its observations are collected" (*Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXVII.4, p. 934.)

(b) Usefulness of the distinction

240. For a long time, then, the two types of unilateral declaration were not clearly distinguished in State practice or in doctrine. In the latter case, the dominant view grouped them together, and authors who made a distinction generally found themselves embarrassed by it.[352]

241. The preparatory work for the 1969 Vienna Convention[353] and the subsequent adoption of that instrument have hardly contributed to a uniform doctrinal approach,[354] the current state of which is summarized by Frank Horn as follows: "To sum up, legal doctrine has not succeeded in doing away with the uncertainty from which the notion of interpretative declarations suffered throughout all the deliberations of the ILC and the Vienna Conference. Some writers, such as Sinclair, Elias and O'Connell, contend for different reasons that interpretative declarations should not be identified with reservations. The concept of reservation and the concept of interpretative declaration were independent and non-overlapping. Others, like Tomuschat, demand that these declarations should be identified with reservations. A third group chose a position between these two extremes by counting only interpretative declarations presented as an absolute condition for participation in the treaty as reservations. The concept of interpretative declaration and the concept of reservation were distinct but partly overlapping."[355]

242. It is true that the preparatory work for the Vienna Convention on the Law of Treaties is unlikely to dispel any doubts one may have with regard to their true legal nature: not only does the Vienna Convention not define them, but the positions taken during its elaboration probably help to make a controversial concept even more obscure. This was in fact the case, as the preparatory process drew to a close, with the positions taken by Sir Humphrey Waldock, Special Rapporteur, who, after rejecting a Japanese proposal which sought to define interpretative declarations positively on the pretext that the problem was one of interpretation, nevertheless maintained that such documents could not be considered contextually relevant for the purposes of interpreting a treaty.[356]

243. These uncertainties are not necessarily bad. After all, imprecision in the rule of law can be constructive and lead to fruitful developments by allowing practice to set the norm (or determine the absence thereof) based on needs and circumstances. In the view of the Special Rapporteur, however, this is not the case with the situation at hand: whatever its flaws or inadequacies, the regime of reservations set out in articles 19 to 23 of the Vienna Conventions is a relatively limiting *corpus juris*; it is therefore important for States and international organizations to know exactly the instruments to which it applies. This is true first of all for the State or international organization expressing its consent to be bound, which must choose between a genuine reservation or a "simple" interpretative declaration; it is true also for the depositary, who must communicate the reservation to the other States parties and to States entitled to become parties,[357] and it is equally true for the other States

[352] See the survey of doctrine prior to 1969 made by Frank Horn, *Reservations to Multilateral Treaties*, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 229; see also D. M. McRae, "The legal effect of interpretative declarations", *British Yearbook of International Law 1978*, p. 156; Rosario Sapienza, op. cit., pp. 69-82 (prior to the Second World War) and pp. 117-122 (post-1945); or Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), pp. 52-53.

[353] See above, paras. 53-68.

[354] See again the accounts by Frank Horn, op. cit., pp. 234-235, and Rosario Sapienza, op. cit., pp. 203-207.

[355] Frank Horn, op. cit., p. 235.

[356] See paras. 63-65 above and para. 355 below.

[357] Article 23, paragraph 1, of the 1969 and 1986 Conventions.

parties themselves, whose silence on a reservation has effects that are codified in the Vienna Conventions.[358] "However elusive the distinction may be in certain cases, the consequences are important."[359]

244. It is true that this reasoning implies that the problem is partially solved in that it postulates that the regime applicable to interpretative declarations is distinct from the regime for reservations, an assumption which some authors contest.[360] The approach taken in the present report[361] is based on this assumption, the merits of which can only be determined to the extent that the legal regime of interpretative declarations is spelt out.

245. Suffice it at this stage to note that States (and, to a lesser degree, international organizations) make this distinction whenever they formulate unilateral declarations when signing multilateral treaties or expressing their consent to be bound and their partners do not treat all of them, at least not always, in the same manner, any more than does case law.[362]

246. Moreover, the question of a distinction between reservations and interpretative declarations is one of the questions on which the representatives of States in the Sixth Committee[363] and the members of the International Law Commission[364] have focused on most frequently in the debates on earlier reports on reservations to treaties. This would seem sufficient to establish that clarification of this distinction meets a genuine need.

247. However, this is a particularly difficult task, since the inconsistency of the terminology and the broad range of reasons that lead States to formulate interpretative declarations make the search for distinguishing criteria tricky, and applying such criteria is likewise not unproblematic.

(i) The difficulty in distinguishing between reservations and interpretative declarations

248. "The question of determining the nature of a statement is one of the very fundamental problems in reservation law."[365] Its solution is complicated by the variety of objectives pursued by the authors of such declarations and the imprecision of the terminology used.

a. Obstacles arising from the variety of reasons that lead States to make interpretative declarations

249. Surely, if words have meaning, then the provisions of a treaty are to be interpreted, in principle, without – and this is the difference between interpretative declarations and reservations – modifying or excluding their legal effect. Over and above this, however, the

---

[358] Article 20.

[359] Derek Bowett, "Reservations to non-restricted multilateral treaties", *British Yearbook of International Law 1976–1977*, p. 69.

[360] See in particular Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties – Comments on articles 16 and 17 of the ILC's draft articles on the law of treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1967, p. 465.

[361] See paras. 45 and 46 above.

[362] See paras. 164-165 above and 286-290 below.

[363] See in particular the statements made on this topic by Sweden, speaking on behalf of the Nordic countries (28 November 1997, A/C.6/52/SR.21, para. 13), South Africa (ibid., para. 57) and the Republic of Korea (1 December 1997, A/C.6/52/SR.22, para. 6).

[364] See in particular the statements by Mr. Tomuschat (16 June 1995, A/CN.4/SR.2401), Mr. Razafindralambo (20 June 1995, A/CN.4/SR.2404), Mr. Rosenstock (ibid.), Mr. He Qizhi (ibid. and 25 June 1997, A/CN.4/SR.2499), Mr. Villagran-Kramer (21 June 1995, A/CN.4/SR.2402), Mr. El-Arabi (ibid.), Mr. Yamada (29 June 1995, A/CN.4/SR.2407), Mr. Arangio-Ruiz (ibid.) and Mr. Addo (25 June 1997, A/CN.4/SR.2499).

[365] Frank Horn, op. cit., p. 336.

reasons that lead States to use this process appear to be fairly varied, as demonstrated by the responses of States to the questionnaire on reservations to treaties.

250. In certain situations, it is clear that the executive power must reassure the national parliament as to the actual scope of a treaty by which the State is to be bound. William Bishop considers that this was the case with the "reservation" of the United States of America to the Hague Convention for the Pacific Settlement of Disputes of 1899[366] and the British and American declarations on the subject of the 1928 Kellogg-Briand Pact.[367] Likewise, when ratifying the 1914 London Convention on Safety of Life at Sea, the United States Government attached understandings to its instrument, stipulating that:

> "These 'understandings' were adopted by the Senate to meet objections which had been made to ratification of the Convention because of apprehension in some quarters that the Act of Congress approved March 4, 1915, known as the Seaman's Act, might be affected thereby."[368]

251. Very often this concern relates to a desire to put forward an interpretation that is compatible with the provisions of internal legislation,[369] which is one of the most frequently cited reasons for such declarations.[370] This was the case, for example, with the Swiss declaration in respect of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[371] or the famous French declaration concerning article 27 of the 1966 International Covenant on Civil and Political Rights:

> "In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned".[372]

252. In other instances, declarations are intended to recall the existence of general principles of international law that the author State considers to be of special importance. For example, Sweden explained the declaration it made when signing the United Nations Convention on the Law of the Sea as being "mainly of a security policy nature".[373] And this was probably the spirit of the declarations made by Belarus, the Russian Federation, Ukraine and Viet Nam in respect of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character: these four States felt it necessary to declare, in very similar terms, that

---

[366] William W. Bishop, Jr., op. cit., p. 256, this famous "reservation" interprets the Convention as being compatible with the Monroe Doctrine.

[367] Ibid., pp. 307 and 309.

[368] Ibid., p. 311.

[369] In its reply to the questionnaire on reservations, the Holy See indicated that the declarations it made were intended to "spell out the effects of the treaty obligation in relation to the very nature of the Holy See" (reply to question 3.4).

[370] In its response to question 3.4 of the questionnaire on reservations, Mexico said: "In general, declarations are related to the internal application of the instruments in respect of which they are formulated, in the light of the provisions of national legislation". See also Kuwait's response to question 3.4.

[371] *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chapter XVIII.7, p. 735.

[372] Ibid., chapter IV.4, p. 124.

[373] Reply to question 3.1 of the questionnaire on reservations; see also Panama's reply to question 3.4 on the subject of the declaration that country attached to its instrument of ratification of the Cartagena Protocol of 1985 or the declaration by Japan concerning the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXVII.3, p. 929).

"the principle of the absolute inviolability of the offices of delegations to international conferences is a rule of customary international law which must be observed by all States."[374]

253. An interpretative declaration can also be formulated with a view to recalling the position taken by a State during the negotiations which led to the adoption of the treaty. This was how Argentina partially explained the declarations it attached to its ratification of the United Nations Convention on the Law of the Sea and Mexico explained those which accompanied its signature of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (the Seabed Treaty), and the Convention on Bacteriological (Biological) and Toxin Weapons.[375] Likewise, the only interpretative declaration mentioned by Peru in response to the questionnaire on reservations concerned the Cartagena Protocol revising the Charter of the Organization of American States (OAS) and consisted of a reaffirmation of the country's position during the negotiations.[376]

254. Finally, it cannot be denied that some unilateral declarations are presented as "interpretative" with a view to getting around the prohibition or limitation on reservations stipulated in the treaty to which they apply, or as the result of the general rules applicable to reservations (particularly *rationae temporis*).[377]

255. A number of commentators[378] have noted that some of the "interpretative declarations" attached by nuclear-weapon States to their ratification of the Treaty of Tlatelolco, which concerns the denuclearization of Latin America and article 27 of which prohibits reservations but not interpretative declarations, and of the protocols to the Treaty were actually reservations.[379] Similarly, the interpretative nature of some of the declarations made by States concerning the United Nations Convention on the Law of the Sea, articles 309 and 310 of which prohibit reservations but expressly permit declarations, provided that they "do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State", was contested by other States parties.[380]

256. Furthermore, even when a reservation might be possible, it is clear that States often prefer to make use of so-called "interpretative" declarations, which ostensibly make their hesitation less obvious. As Denmark noted in its reply to questions 3.1 to 3.13.2 of the questionnaire on reservations: "there even seems to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty does not allow

---

[374] Ibid., chapter III.11, pp. 81-82.

[375] Reply to question 3.4 of the questionnaire on reservations.

[376] Reply to question 3.1, the declaration made at the time of signature, 5 December 1985, is clearer in this regard than that which accompanied the instrument of ratification, dated 18 September 1996.

[377] See the "declarations" made by Yugoslavia to the 1971 Treaty on denuclearization of the seabed (see Luigi Migliorino, "Declarations and reservations to the 1971 Seabed Treaty", *Italian Yearbook of International Law 1985*, p. 111). In the past, some States also sought to bypass the requirement that reservations must be unanimously accepted; see Kaye Holloway, *Modern Trends in Treaty Law, Constitutional Law, Reservations and the Three Modes of Legislation* (London, Stevens, 1967), p. 486.

[378] The Special Rapporteur does not intend, at least not at this stage, to give his views on the relative merits of these analyses or of the "requalifications" invoked by some co-contracting parties.

[379] See, for example, Hector Gros Espeill, "*La signature par la France du Protocole additionnel I du Traité de Tlatelolco*", *Annuaire français de droit international*, or Pascal Boniface, *Les sources du droit du désarmement* (Paris, Économica, 1989), pp. 76-81.

[380] See in particular the many objections raised in connection with the declaration by the Philippines (see *Multilateral Treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXI.6, pp. 873-876).

for reservation proper or because it looks 'nicer' with an interpretative declaration than a real reservation".

b. Obstacles arising from unclear terminology

257. An important element of the definition of reservations has to do with its indifference to the terminology used by States or international organizations when they formulate them, a fact that the 1969 and 1986 Vienna Conventions highlight by defining a reservation as "a unilateral statement, *however phrased or named* ...".[381]

258. This "negative precision" eschews any nominalism to focus attention on the actual content of declarations and on the effect they seek to produce, but – and here is the reverse side of the coin – this decision to give precedence to substance over form runs the risk, in the best of cases, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; in the worst cases, it allows them to play with names in the (often successful) hope of misleading their partners as to the real nature of their intentions. By giving the name of "declarations" to instruments that are obviously and unquestionably real reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them "reservations", even though under the terms of the Vienna definition they are not.

259. Regardless of the true objectives pursued by States, it must be admitted that the terminology in this area is marked by a high level of confusion.

260. While in French one encounters few terms other than "*réserves*" and "*déclarations*",[382] English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only "reservation" and "(interpretative) declaration", but also "statement", "understanding", "proviso", "interpretation", "explanation" and so forth.[383]

---

[381] See paras. 228-235 above.

[382] This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between "*reserva*" and "*declaración (interpretativa)*", in Italian between "*riserva*" and "*dichiarazione (interpretativa)*", in Portuguese between "*reserva*" and "*declaracão (interpretativa)*", and in Romanian between "*rezervă*" and "*declarație (interpretativă)*". The same holds true for Arabic, German and Greek.

[383] See note 338 above. Marjorie M. Whiteman describes United States practice this way: "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation. ... The terms 'declaration' and 'statement' are used most often when it is considered essential or desirable to give matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty" (*Digest of International Law* (Washington, D.C., 1970), vol. 14, pp. 137-138); see also the letter dated 27 May 1980 from Mr. Arthur W. Rovine, Assistant Legal Adviser for Treaties in the United States Department of State, to Mr. Ronald F. Stowe, Chairman of the Air and Space Law Committee of the International Law Section of the American Bar Association, reproduced in Marian Nash Leich, ed., *Digest of United States Practice in International Law* (Washington, D.C., Office of the Legal Adviser, Department of State, 1980), pp. 397-398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention relating to the Organisation for Economic Cooperation and Development (OECD), when the Chairman of the Foreign Affairs Committee asked what the difference between a "declaration" and an "understanding" was, the Under-Secretary of State for Economic Affairs replied: "Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything" (quoted by Marjorie

261. Instruments having the same objective can be called "reservations" by one State party and "interpretative declarations" by another. For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to "place on record its interpretation" of that provision.[384] Professor Erik Suy gives the example of identically worded declarations by Italy and Trinidad and Tobago regarding article 15 of the International Covenant on Civil and Political Rights, but described as a declaration by the former and a reservation by the latter; "[at] the request of the Secretariat, the Government of Trinidad and Tobago indicated that it was simply an interpretative declaration".[385]

262. Sometimes instruments having the same purpose are qualified as "reservations" by some States, "interpretations" by others and not qualified at all by still others.[386]

263. In some cases, a State will employ various expressions that make it difficult to tell whether they are attempting to formulate reservations or interpretative declarations and whether they have different meanings or scope. France, for example, upon acceding to the International Covenant on Civil and Political Rights, used the following:

"The Government of the Republic considers that ...";

"The Government of the Republic enters a reservation concerning ...";

"The Government of the Republic declares that ...";

"The Government of the Republic interprets ...";

with all of these formulas appearing under the heading "Declarations and reservations".[387]

264. Thus the same words can, in the view of the very State employing them, cover a range of legal realities. In accepting the Statute of the Intergovernmental Maritime Consultative Organization (IMCO), Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Cambodia explained that the first part of its declaration was "a political declaration" but that the second part was a reservation.[388]

265. It sometimes happens that, faced with an instrument entitled "declaration", the other parties to the treaty view it in different ways and treat it either as such or as a "reservation", or, conversely, that objections to a "reservation" refer to it as a "declaration". For example,

---

M. Whiteman, op. cit., p. 192). As the Special Rapporteur understands it, in Chinese, Russian and the Slavic languages in general it is possible to draw distinctions between several types of "interpretative" declarations.

[384] *Multilateral treaties deposited with the Secretary-General – status as at 31 December 1996*, chapter IV.2, pp. 104, 106 and 115, note 15. Poland and the Syrian Arab Republic have also declared in the same terms that they do not consider themselves bound by the provisions of article 1, paragraph 1, of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, but the former expressly called this statement a "reservation", while the latter labelled it a "declaration" (ibid., chapter XVIII.7, p. 765).

[385] "Treaty law and human rights" in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte – Festschrift für Hermann Mosler* (Berlin, Heidelberg, New York, Springer, 1983), p. 945.

[386] See in this connection the comments by Frank Horn (op. cit., p. 294) on the subject of declarations made in respect of the 1966 International Covenant on Civil and Political Rights.

[387] Example cited by Rosario Sapienza, op. cit., pp. 154-155. Full text in *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter IV.4, pp. 123.

[388] Ibid., chapter XII.1, pp. 640-641 and p. 658, note 10.

while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Germany and the United Republic of Tanzania) and sometimes "declarations" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom).[389]

266. At the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations. Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to article 64 of that instrument.[390]

(ii) The definition of interpretative declarations

267. It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an indispensable criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek it empirically, however, by starting, as one generally does,[391] with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

a. Interpretative declarations in the light of the definition of reservations

268. It appears *prima facie* that the four constituent elements of the definition of reservations[392] "discriminate" unequally, given that two of them, the character of a unilateral declaration and the indifference to nominalism, are surely to be found in the definition of interpretative declarations. This is less clear where the criterion of *ratione temporis* is concerned, since excluding it from the definition of interpretative declarations would in any case not be sufficient to justify a regime other than the regime of reservations. It is therefore the teleological element, the aim of the author, that would at first glance seem to be the determining one.

269. For the sake of convenience, it might be useful to distinguish between those elements of the definition that are common to both institutions and the teleological element, which involves the criterion of distinction itself, and to consider separately the question, of secondary importance but controversial, as to when an interpretative declaration may be made.

---

[389] Ibid., chapter III.3, pp. 58-63.

[390] Example cited by William Schabas, commentary on article 64 in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (dirs.), *La Convention européenne des Droits de l'homme – Commentaire article par article* (Paris, Economica, 1995), p. 926.

[391] See Rosario Sapienza, op. cit., p. 142. Frank Horn points out that there are two possible approaches: "It appears that writers mean different things when they talk about interpretative declarations. Some have meant the term 'interpretative declaration' as used on various occasions by States; others have had an objective concept of interpretative declarations in mind" (op. cit., p. 236). The attempt made in this report represents an intermediate approach: it begins with the twofold postulate according to which (1) reservations and interpretative declarations are distinct legal realities, as empirical observation of State practice shows (and this is related to the first of the approaches identified by Horn), and (2) interpretative declarations are intended ... to interpret the provisions of a treaty and not to exclude or modify their legal effect in their application to the State formulating them (this relates to the second approach, which is more "normative" than "descriptive").

[392] See paras. 79-83 above.

i. Elements common to the definitions of reservations and interpretative declarations

270. These common elements are: first, that both are unilateral declarations made by States or international organizations; and, second, that their name or phrasing is irrelevant to their definition.

"A unilateral declaration ..."

271. "As concerns the outer requisites and their formal appearance, interpretative declarations may not be distinguished from reservations. Both are unilaterally initiated, cast in writing and presented at clearly identifiable moments."[393]

272. There would seem to be little point in dwelling on the first aspect: an interpretative declaration is just as much a unilateral declaration as is a reservation. It is in fact this common point that lies at the origin of the whole problem of distinguishing between them: they present themselves in the same manner; nothing distinguishes them as to form.

Joint formulation of an interpretative declaration

273. At most it must be noted that, as with reservations, this unilateral character poses no obstacle to their joint formulation by several States and/or international organizations. And while draft guideline 1.1.1, which recognizes this possibility vis-à-vis reservations, is not, to the best of the Special Rapporteur's knowledge, based on any precedent,[394] the same cannot be said with regard to interpretative declarations.

274. Indeed, as in the case of reservations, it is not uncommon for several States to consult with each other before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the "Eastern bloc" countries prior to 1990,[395] with those made by the Nordic countries in respect of several conventions,[396] or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on chemical weapons and confirmed upon ratification, which stated:

> "As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable."[397]

275. At the same time, and contrary to what has occurred thus far in the area of reservations, there have also been truly joint declarations, formulated in a single instrument, by "the European Community and its Member States" or by the latter alone. This occurred in the case of:

[393] Frank Horn, op. cit., p. 236.

[394] See para. 131 above.

[395] See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation, the wording of Viet Nam's declaration is ambiguous) (*Treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter III.3, pp. 55-58) or those of Albania, Belarus, Bulgaria, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the Convention on the Political Rights of Women (ibid., chapter XVI.1, pp. 704-706).

[396] See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the Vienna Convention on Consular Relations (ibid., chapter III.6, pp. 72-74).

[397] Ibid., chapter XXVI.3, pp. 904-905.

(a) Examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials;[398]

(b) Implementation of the United Nations Framework Convention on Climate Change of 9 May 1992;[399]

(c) Implementation of the Convention on Biological Diversity;[400]

(d) Implementation of the Agreement of 4 August 1995 on straddling fish stocks.[401]

276. There are real precedents which justify *a fortiori* the adoption of a draft guideline on interpretative declarations similar to draft guideline 1.1.1 on reservations.

Guide to practice

"1.2.1 The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations."

277. As is the case with reservations, it must be understood, first, that such a formulation cannot limit the discretionary competence of each of the "joint declarants" to withdraw, or even modify,[402] the declaration as it affects that party and, second, that this draft guideline does not prejudge the permissibility or validity of the declarations in question any more than does any other draft guideline in this part of the Guide to Practice.

The question of verbal interpretative declarations

278. As indicated above,[403] a reservation is conceivable only if it is formulated in writing. This is not necessarily so for interpretative declarations.

279. The reasons why reservations must necessarily be in written form are the following:

(a) Article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions requires it;

(b) It is made indispensable by the very definition of reservations and by their legal regime; seeking to exclude or modify the legal effects of the provisions of a treaty in their application to the State formulating them, they must be subject to objections and may not enter into force unless accepted by the other contracting parties in one way or another.

280. These reasons do not apply to interpretative declarations to the same extent:

(a) Their legal regime is not set out in the Vienna Conventions;

(b) As will be established,[404] they do not necessarily elicit reactions from the other contracting parties;

(c) Since they are related to the rules governing the interpretation of treaties, they call, at least in some cases, for a more flexible, less formalistic legal regime than that applicable to reservations.

281. It therefore seems *a priori* that there is nothing to prevent the verbal formulation of interpretative declarations. Yet for the sake of symmetry, since the definition of reservations

[398] Ibid., chapter XIV.5, p. 691.
[399] Ibid., chapter XXVII.7, p. 940.
[400] Ibid., chapter XXVII.8, p. 944.
[401] Ibid., chapter XXI.7, pp. 856-857.
[402] On this point, see para. 343 below.
[403] Paras. 126 and 127.
[404] See note 451 and para. 344 below.

does not expressly mention their written form, the Special Rapporteur will refrain from proposing at the current stage a draft guideline along these lines. He will do so when he takes up, in his next report, the question of the formulation of reservations and interpretative declarations.

"... however phrased or named ..."

282. The second point that reservations and interpretative declarations have in common has to do with the non-relevance of the name or designation given them by the author.[405]

283. This is contested by some authors who believe that it is appropriate to "take States at their word" and to consider as interpretative declarations those unilateral declarations which have been so titled or worded by their authors.[406] This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by preventing States from "playing around" with the names they give to the declarations they make with a view to sidestepping the rules governing reservations or misleading their partners.[407]

284. However, this position runs up against two nullifying objections:

(a) Firstly, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation "however phrased or named", this of necessity means that simple "declarations" (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations;

(b) Secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.

285. Virtually all authors who have recently dealt with this delicate distinction between reservations and interpretative declarations cite numerous examples of unilateral declarations presented as interpretative declarations by the States formulating them which they themselves consider to be reservations or vice versa.[408] For example:

(a) Professor Bowett considers that the reservation by the Soviet Union to the 1961 Vienna Convention on Diplomatic Relations with regard to mission size "was not a true reservation" but was simply an interpretation;[409]

(b) Frank Horn devotes an entire chapter of his important work, *Reservations and Interpretative Declarations to Multilateral Treaties*[410] to a consideration of "doubtful statements"; these include the declaration by the Sudan concerning article 38 of the same Convention,[411] those made by several States to the 1951 Geneva Convention relating to the

---

[405] For a discussion of this element of the definition of reservations, see paras. 167-170 above.

[406] See, for example, the analysis of the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Hector Gros Espiell ("*La signature du Traité de Tlatelolco par la Chine et la France*", *Annuaire français de droit international 1973*, p. 141. However, the author also bases himself on other parameters). This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see para. 354 below).

[407] See paras. 255-257 above.

[408] The Special Rapporteur wishes to recall (see note 378 above) that it is not his intention to discuss these analyses himself or to contest them; the following examples are simply intended to show that the prevailing doctrine does not attach critical significance to the terminology used by States.

[409] Derek Bowett, op. cit., p. 68.

[410] Frank Horn, op. cit., pp. 278-324.

[411] Ibid., p. 279.

Status of Refugees,[412] that of Italy concerning article 34 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone,[413] all of which he considers to be true reservations even though the States in question presented them as interpretative declarations;

(c) Professor McRae considers that Canada's "reservation" to articles 23 and 24 of the 1951 Convention relating to the Status of Refugees is in reality a simple interpretative declaration;[414]

(d) Luigi Migliorino endeavours to demonstrate that several "interpretative declarations" formulated when signing or ratifying the 1971 Seabed Treaty were in reality reservations, while the "reservational" nature of some unilateral declarations presented as such is doubtful;[415]

(e) Rosario Sapienza also provides a goodly number of examples of cases he considers dubious, including the declarations by France concerning the International Covenant on Civil and Political Rights, the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child; the declaration by Italy concerning the International Covenant on Economic, Social and Cultural Rights; those of the United Kingdom concerning the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; the declarations by the Netherlands concerning the 1951 Convention on refugees, the 1984 Convention against Torture and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the declarations by Germany concerning the Convention on the Elimination of Discrimination against Women and the International Covenant on Civil and Political Rights.[416]

286. In making such reclassifications, the authors generally have little difficulty in basing themselves on the practice of the States themselves, who, faced with unilateral declarations presented by their authors as being interpretative, do not hesitate to raise objections to them because they expressly consider them to be reservations.[417]

287. There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

(a) The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights:

> "In the opinion of the Government of the Kingdom of the Netherlands, [the interpretative declaration in question] must be regarded as a reservation to the Covenant. From the text and history of the Covenant it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the

[412] Ibid., p. 300.
[413] Ibid., p. 313.
[414] D. M. McRae, op. cit., p. 162, note 1.
[415] Luigi Migliorino, op. cit., pp. 106-123.
[416] Rosario Sapienza, op. cit., pp. 154-176.
[417] See notes 378 and 408 above.

Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it";[418]

(b) The reactions of many States to the declaration by the Philippines in respect of the United Nations Convention on the Law of the Sea:

"The Byelorussian Soviet Socialist Republic considers that the [declaration] that was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof";[419]

(c) The objection of Mexico, which considered that:

"... the third declaration submitted by the Government of the United States of America ... constitutes a unilateral claim to justification, not envisaged in the Convention, for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention";[420]

(d) The reaction of Germany to a declaration by which the Tunisian Government indicated that it would not adopt, in implementation of the Convention on the Rights of the Child of 20 November 1989, "any legislative or statutory decision that conflicts with the Tunisian Constitution":

"The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence of article 4 ..."[421]

288. It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States of America reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the treaty).[422] In the same spirit, Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention *insofar as the said declarations are to be qualified as reservations*".[423] Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[424]

---

[418] *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter IV.3, p. 116.

[419] Ibid., chapter XXI.6, p. 841; see also the reactions, in the same terms or in the same spirit, of Australia, Belarus, Bulgaria, the Russian Federation and Ukraine (ibid., pp. 841-843).

[420] Ibid., chapter VI.19, p. 307.

[421] Ibid., chapter IV.11, pp. 213 and 215.

[422] Example cited by Luigi Migliorino, op. cit., p. 110.

[423] *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXI.2, pp. 810 and 811.

[424] See in particular the reaction of Finland: "Without taking any stand on the content of the declarations, which appear to be reservations in nature ..." (ibid., chapter XXVII.3, p. 931).

289. Judges and arbitrators are no more reluctant to question the real nature of unilateral declarations formulated by States in respect of a treaty and, where necessary, to reclassify them.[425]

290. In its decision of 8 November 1989 in the case of *T. K. v. France*, the Human Rights Committee, basing itself on article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties, decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because the French Government, on acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable so far as the Republic is concerned". The Committee observed

> "in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature".[426]

291. In an individual opinion which she attached to the decision, Mrs. Higgins criticized this position, pointing out that, in her view,

> "the matter [was not] disposed of by invocation of article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key.
>
> "An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19 it uses the phrase 'enters a reservation'. In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation, or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase 'reservation' and 'declaration' was not entirely deliberate, with its legal consequence well understood by the Government of the Republic."[427]

292. There is, of course, no need to take a position on the substance of the specific problem on which the Human Rights Committee was to decide. Two points, however, must be raised with regard to Mrs. Higgins's opinion:

(a) On the one hand, although she reached a different conclusion from the majority in the case at hand, she did not contest the fact that, where necessary, a declaration presented as being interpretative could be considered to be a reservation;

(b) On the other hand, and it is here that she distinguishes herself from the majority, she nevertheless attaches great significance to the nomenclature used by the "declaring" Government, particularly as the Government had, in this case, formulated both reservations and interpretative declarations.[428]

---

[425] On this point, see paras. 231-233 above.

[426] Communication No. 220/1987, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), annex X, para. 8.6, p. 123.

[427] Ibid., appendix II, p. 125.

[428] Curiously, the French declaration on article 27 is drafted in such a way that it appears to interpret the French Constitution more than the Covenant.

293. This problem was in fact posed in the same terms in the *Belilos* case:[429] Switzerland had also formulated both reservations and interpretative declarations, and the European Commission of Human Rights proved to be more sensitive to this aspect of the question than the Committee had been in *T. K. v. France*: it maintained that

> "if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former".[430]

294. The Strasbourg Court proved to be less categorical, but somewhat embarrassed:

(a) Firstly, it concurred with Mrs. Higgins's reasoning, pointing out that it "cannot see how" the lack of terminological uniformity "could in itself justify describing the declaration in issue as a reservation";[431]

(b) Secondly, basing itself on the *travaux préparatoires* for the adoption of the Swiss instrument of ratification, it noted that the "text in issue" appeared to "qualify ... Switzerland's consent to be bound by the Convention";[432]

(c) Thirdly, it observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation;[433]

(d) Lastly, it did not formally reclassify the disputed interpretative declaration as a reservation, but merely stated that it intended to examine "the validity of the interpretative declaration in question, *as in the case of a reservation*".[434]

295. In its decision in the *Temeltasch* case, handed down six years later, the European Commission of Human Rights did not hesitate to reclassify an interpretative declaration as a reservation.[435]

296. From these observations one may draw the following conclusions: if the phrasing and name of a unilateral declaration are not part of the definition of an interpretative declaration any more than they are of the definition of a reservation, they nevertheless constitute an element that must be taken into consideration and which can be viewed as having particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

297. This observation is consistent with the more general doctrinal position that "there is a potential for inequity in this aspect ['however phrased or named'] of the definition": "Under the Vienna Convention, the disadvantages of determining that a statement is a

---

[429] See para. 231 above.

[430] See the Judgment of the Court in this case, 21 May 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 40, p. 21.

[431] Ibid., para. 46, p. 23.

[432] Ibid., para. 48, p. 24.

[433] Ibid., para. 49, p. 24.

[434] *Idem*, emphasis added. Reading the Judgment one gets the distinct impression that this was the outcome sought by the Court and which guided its thinking. See in particular the commentary of Henry J. Bourguignon, "The Belilos case: New light on reservations to multilateral treaties", *Virginia Journal of International Law*, 1989, p. 347 ff.; Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", *GYBIL 1990*, pp. 69-86; Gerard Cohen-Jonathan, "*Les réserves à la Convention européenne des Droits de l'homme (A propos de l'arrêt Belilos du 29 avril 1988)*", *RGDIP 1989*, pp. 301-305; or R. St. J. MacDonald, "Reservations under the European Convention on Human Rights", RBDI 1988, pp. 438-442.

[435] Decision of 5 May 1982, European Commission of Human Rights, *Decisions and Reports*, No. 31, April 1983, paras. 68-82, pp. 138-142.

reservation are ... imposed over the other parties to the treaty. [...] It would be unfortunate in such circumstances if the words 'however phrased or named' were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation. [...] While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States."[436]

298. Without reopening the debate on the principle posed by the Vienna Convention with regard to the definition of reservations, a principle which ought to extend to the definition of interpretative declarations,[437] it would seem legitimate, then, to spell out in the Guide to Practice the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however named or phrased". This could be achieved by admitting that there is a presumption, not irrefragable, attached to the name a declaring State gives to its declaration. The Commission might also stipulate that when a State formulates reservations and interpretative declarations at the same time, this presumption, while still refragable, is reinforced.

Guide to practice

"1.2.2 It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations."

299. Similarly, it is possible that the treaty in respect of which the declaration is being made may itself provide an indication, or at least a presumption, of the legal nature of the declaration. This is the case in particular when a treaty prohibits reservations of a general nature[438] or to certain of its provisions.[439]

300. In such situations, declarations made in respect of provisions to which any reservation is prohibited must be considered to constitute interpretative declarations. "This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect the State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached."[440]

301. It goes without saying, however, that such a presumption is not irrefragable either, and that if the declaration is really intended to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be an impermissible reservation and treated as such.

---

[436] D. W., "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law, 1995*, pp. 27-28, see also p. 34.

[437] See paras. 350-365 below.

[438] As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

[439] As, for example, in the case of article 12 of the Geneva Convention on the continental shelf, which deals with reservations to articles 1 to 3. See the arbitral decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, *United Nations Reports of International Arbitral Awards*, vol. XVIII, paras. 38-39, p. 161; see also the individual opinion of Herbert W. Briggs, ibid., p. 262.

[440] D. W. Greig, op. cit., p. 25.

Guide to practice

"1.2.3 When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation."

ii. The teleological factor, a criterion for distinguishing between interpretative declarations and reservations

302. All interpretative declarations seek to interpret the provisions of a treaty. However, while the State or international organization formulating them may, in some cases, limit itself to proposing an interpretation, in others it may seek to impose that interpretation on the other contracting parties or, in any case, makes it a condition for being bound, so that a distinction must be drawn between two very different types of interpretative declarations. In other words, while all interpretative declarations are intended to clarify the meaning and the purpose of the provisions of the treaty in question, some have another function in that they condition acceptance of the treaty by the State or international organization formulating them.

Clarifying the meaning and scope of the provisions of a treaty, an element common to the definition of all interpretative declarations

303. Like reservations, interpretative declarations, no matter how phrased or designated, are unilateral declarations. However, they are not to be confused with them: unlike reservations, they seek neither to exclude nor to modify the legal effect of the treaty in respect of which they are made; in this respect they differ greatly from reservations, as Fitzmaurice noted as early as 1962.[441] As their name indicates, they are intended to interpret.

304. This can – and must – constitute the central element of their definition, yet it poses difficult problems nonetheless, the first of which is determining what is meant by "interpretation".

305. This is a highly complex concept, the elucidation of which would far exceed the scope of the present report.[442] In truth, it is probably not useful for the purpose of defining interpretative declarations. Suffice it to say, in a phrase often recalled by the International Court of Justice, that "the expression 'to construe' [*'l'interprétation'* in French] must be understood as meaning to give a precise definition of the meaning and scope" of a binding

[441] See para. 57 above.

[442] Regarding the concept of interpretation, see in particular the reports by Hersch Lauterpacht at the Institute of International Law, *"De l'interprétation des traités"*, *III. Yearbook 1950*, pp. 366-423, and *1952*, vol. I, pp. 197-223, and vol. II, pp. 359-406; V. D. Degan, *L'interprétation des accords en droit international* (Nijhoff, The Hague, 1963), p. 176; Myres S. McDougall, H. D. Laswell and J. C. Miller, The Interpretation of Agreements and World Public Order (Yale University Press, 1967), 410 pp., and Dordrecht, Nijhoff, 1993, 536 pp.; Serge Sur, *L'interprétation en droit international public* (Paris, LGDJ, 1974), 449 pp.; Mustapha Kamil Yasseen, *"L'interprétation des traités d'après la Convention de Vienne"*, *Recueil des cours de l'Académie de droit international de la Haye*, 1976-III, vol. 151, pp. 1-114; or Marteen Bos, "Theory and practice of treaty interpretation", *Netherlands International Law Review, 1980*, pp. 3-38 and 135-170.

legal instrument,[443] in this case a treaty. What is essential is that interpreting is not revising.[444] While reservations ultimately modify, if not the text of the treaty, at least its legal effect,[445] interpretative declarations are in principle limited to clarifying the meaning and the scope of the treaty as the author State or international organization perceives them.

306. But this raises further difficult problems, of which two are:

(a) First, the interpretation covered by the declaration is not imposed as such on the other contracting parties; accordingly, the definition as outlined thus far necessarily leads to the question of the scope of interpretative declarations;

(b) Secondly, it must be acknowledged that this scope is not unequivocal: if the definition adopted is to be "operational" and lead usefully to the application of coherent legal rules separate from those applicable to reservations, a distinction must be made between two categories of interpretative declarations, still in terms of the authors' desired objective.

307. It is not insignificant that the rules relating to reservations and those relating to the interpretation of treaties appear in different parts of the Vienna Conventions of 1969 and 1986: the former are included in the part II, which deals with the conclusion and entry into force of treaties, while the latter are to be found in the part III, together with those dealing with observance and application of treaties.

308. In fact, there is no gap between the formation and the application of international law[446] or between interpretation and application: *"La mise en oeuvre des règles supposent leur interprétation préalable. Elle peut être explicite ou implicite, et dans ce cas se confond avec les mesures d'interprétation"* ("The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of interpretation").[447] Some have even gone so far as to affirm that *"la règle de droit, dès l'instant de sa création jusqu'au moment de son application aux cas singuliers est une affaire d'interprétation"* ("the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of interpretation").[448]

309. Thus interpretative declarations formulated unilaterally by States or international organizations with regard to the meaning or the scope of the provisions of a treaty can only

---

[443] See the Judgment of 16 December 1927, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)*, Permanent Court of International Justice Series A, No. 13, p. 10; see also the Judgment of 27 November 1950, *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case*, *I.C.J. Reports 1950*, p. 402.

[444] See the Advisory Opinion of 18 July 1950, *Interpretation of peace treaties with Bulgaria, Hungary and Romania*, *I.C.J. Reports 1950*, p. 229, or the Judgment of 27 August 1952, *Rights of nationals of the United States of America in Morocco*, *I.C.J. Reports 1952*, p. 196.

[445] See paras. 147-227 above.

[446] *"On sait que, fondamentalement, l'entreprise de mise en oeuvre des normes n'est pas organiquement distincte de leur formation. En d'autres termes, les États [et les organisations internationales], dont les engagements internationaux sont à l'origine des éléments de formation du droit sont en charge de leur exécution"* ("We know that, fundamentally, the act of implementing norms is not organically distinct from their formation. In other words, States [and international organizations] whose international obligations constitute the source of the elements of law formation are responsible for their implementation") (Sérge Sur in Jean Combacu and Serge Sur, *Droit international public* (Paris, Montchrestien, 1997), p. 163).

[447] Ibid.

[448] A. J. Arnaud, *"Le médium et le savant : signification politique de l'interprétation juridique"*, *Archives de philosophie du droit*, 1972, p. 165 (quoted by Denys Simon in *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone), p. 7).

be one of many elements used in interpreting them. They coexist with other interpretations – contemporaneous, previous or subsequent – that may originate with other contracting parties or third organizations that are entitled to give an interpretation that is authentic and can be imposed on the parties.

310. This also means that "interpretation of the terms of a treaty ... could not be considered as a question essentially within the domestic jurisdiction of a State"[449] and that consequently each State or international organization that formulates such a declaration may choose to submit another interpretation which, in certain cases, may be imposed on all the parties to a treaty or among those who disagree as to the meaning and scope of its provisions, as in cases of arbitration or determination of jurisdiction.

311. In fact, one cannot conclude that a unilateral interpretative declaration is devoid of any legal effect. This problem will be considered in greater detail when the Special Rapporteur takes up the important question of the legal effect of reservations, and thus of interpretative declarations, in a later report.

312. In the meantime, it will be noted, that an interpretative declaration, according to the overview presented by Professor Denys Simon, "*est susceptible en premier lieu de produire des effets juridiques à l'égard de l'État qui l'a émise en vertu du principe de la bonne foi, voire par l'application des règles de l'estoppel. C'est ainsi que la Cour Internationale de Justice, dans l'affaire du Statut du Sud Ouest Africain, a déclaré*" ("is likely first of all to produce legal effects in respect of the formulating State by virtue of the principle of good faith, or indeed by the application of the rules of estoppel. Thus the International Court of Justice, in the *International Status of South-West Africa* case, stated):

> 'Interpretations placed upon legal instruments by the parties to them, though not as conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument'.[450]

En second lieu, l'interprétation unilatérale d'une des parties au traité peut être acceptée, explicitement ou tacitement, par l'ensemble des autres parties et se transformer ainsi en une interprétation authentique du traité. En troisième lieu, l'interprétation unilatérale d'une des parties peut être acceptée, explicitement ou implicitement, par certaines autres parties et se transformer ainsi en interprétation plurilatérale susceptible de produire certains effets juridiques inter pares" ("Secondly, the unilateral interpretation by one of the parties to the treaty may be accepted, explicitly or tacitly, by all of the other parties, thereby becoming an authentic interpretation of the treaty. Thirdly, the unilateral interpretation of one part of the treaty may be accepted, explicitly or tacitly, by some of the other parties, thereby becoming a plurilateral interpretation that may have certain legal effects *inter pares*").[451]

313. From this standpoint, interpretative declarations can be seen as "offers" of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. Their authors may, however, endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one.

---

[449] Advisory Opinion of March 30th, 1950, *Interpretation of peace treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, pp. 70-71; see also the Advisory Opinion of February 7th, 1923, *Nationality decrees promulgated in Tunisia and Morocco, P.C.I.J.*, Series B, No. 4, pp. 29-30.

[450] Advisory Opinion of July 11th, 1950, *I.C.J. Reports 1950*, pp. 135-136.

[451] Denys Simon, op. cit., pp. 22-23, footnotes omitted. It will be noted that the legal effects of unilateral interpretations depend less systematically on the reaction of the other parties than do reservations.

"Simple" and "conditional" interpretative declarations

314. This is what happens when a State or international organization does not limit itself to proposing an interpretation in advance, but makes its interpretation a condition of its consent to be bound by the treaty.

315. The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by Professor D. M. McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that "two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty or part of it. This may be called a 'simple interpretative declaration' [They are referred to as 'mere declaratory statements' by Detter, *Essays on the Law of Treaties*, 1967, pp. 51-52]. The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a 'qualified interpretative declaration'. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. [...] If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might include, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a 'qualified interpretative declaration'. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation".[452]

316. This makes for a good point of departure, with two small provisos:

(a) First, in order to make the distinction, the author probably places too much emphasis on the prospect of a future intervention by a judge or arbitrator;[453]

(b) Secondly, the expression "*qualified* interpretative declarations" has little meaning, at least in French and Spanish, and it would probably be better to stress, right in their name, the criterion that distinguishes them from "simple" interpretative declarations, namely their conditional nature, i.e. the fact that the State subordinates its consent to be bound to the interpretation it puts forward. The term that will be used here, then, is "conditional interpretative declaration", as opposed to "simple interpretative declarations".

317. Far from being purely doctrinal or academic in character, this distinction, which has been used by a number of authors,[454] corresponds to an undeniable practical reality.

318. It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the *sine qua non* to which its consent to be bound is subordinate. For example, France attached to its signature[455] of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties

---

[452] D. M. McRae, op. cit., pp. 160-161.

[453] See para. 332 below.

[454] For examples, see Iain Cameron and Frank Horn, "Reservations to the European Convention Human Rights: The Belilos Case", *German Yearbook of International Law 1990*, p. 77, or Rosario Sapienza, op. cit., pp. 205-206.

[455] The declaration was confirmed upon ratification on 22 March 1974, see the United Nations *Treaty Series*, vol. 936, p. 419.

> to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States".

The conditional nature of the French declaration here is indisputable.

319. Although it is drafted less categorically, the same can surely be said of the "understanding" recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

> "The main objective [of the Government of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ..."[456]

320. In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the International Convention Against the Taking of Hostages of 17 December 1979 should be considered a conditional interpretative declaration:

> "It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their additional Protocols, without any exception whatsoever."[457]

321. The same holds true for the interpretative declaration made by Turkey in respect of the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques:

> "In the opinion of the Turkish Government the terms 'widespread', 'long-lasting' and 'severe effects' contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required."[458]

322. Conversely, a declaration such as the one made by the United States of America when signing the 1988 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes is clearly a simple interpretative declaration:

> "The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means."[459]

323. It is in fact only rarely that the conditional nature of an interpretative declaration is so clearly apparent from the wording used. Most often, the declaring State or international organization simply says that it "considers that ..." ("*considère que ...*",[460] "*estime que ...*"[461])

---

[456] *Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1996*, chapter XXI.6, p. 831.

[457] Ibid., chapter XVIII.5, p. 727.

[458] Ibid., chapter XXVII.1, p. 892.

[459] Ibid., chapter XXVII.1, p. 913.

[460] For examples (of which there are a great many), see the declaration made by Brazil when signing the United Nations Convention on the Law of the Sea (ibid., chapter XXI.6, p. 825), the second declaration made by the European Community when signing the 1991 Convention on Environmental Impact

or "declares that ...",[462] or that it "interprets" a particular provision in a particular way,[463] or that, "according to its interpretation", a particular provision has a certain meaning[464] or that it "understands that ...".[465] In such situations the distinction between "simple" and "conditional" interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.[466]

324. Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by the other parties to the treaty. This is demonstrated by some famous examples.

325. The first example concerns the declaration that India attached to its instrument of ratification of the constituent instrument of IMCO.[467] In its response to the questionnaire on reservations to treaties, the country summarized the episode as follows:[468]

> "When the Secretary-General notified IMCO of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was 'in the nature of reservation' the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter has been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention and Germany on the ground that India might in the future take measures that would be contrary to the Convention.
>
> "In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of the Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it did not constitute a reservation, expressed the hope 'that, in the light of the above-mentioned statement of India an appropriate

---

Assessment in a Transboundary Context (ibid., chapter XXVII.4, p. 934), or those made by Bulgaria to the Vienna Convention on Consular Relations of 1963 (ibid., chapter III.6, p. 71) or to the 1974 Convention on a Code of Conduct for Liner Conferences (ibid., chapter XII.6, p. 669).

[461] See – again, out of many examples – the declarations made by Finland concerning the same Convention (ibid., p. 670).

[462] See the second and third declarations made by France concerning the 1966 International Covenant on Economic, Social and Cultural Rights (ibid., chapter IV.3, p. 112) or that made by the United Kingdom when signing the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (ibid., chapter XXVII.3, p. 930).

[463] See – again, from a wealth of examples – the declarations made by Algeria or Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (ibid., chapter IV.3, pp. 111 and 112), the declaration by Ireland in respect of article 31 of the 1954 Convention relating to the Status of Stateless Persons (ibid., chapter V.3, p. 244) or the first declaration made by France when signing the 1992 Convention on Biological Diversity (ibid., chapter XXVII.8, p. 944).

[464] See the declarations by the Netherlands concerning the 1980 Convention on conventional weapons (ibid., chapter XXVI.2, p. 898) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the 1992 United Nations Framework Convention on Climate Change (ibid., chapter XXVII.7, p. 940).

[465] See the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (ibid., chapter XXI.6, p. 825).

[466] See (c) below.

[467] The text of the declaration appears in *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XII.1, p. 641.

[468] With regard to this episode, see in particular: D. M. McRae, op. cit., pp. 163-165; Frank Horn, op. cit., pp. 301-302; and Rosario Sapienza, op. cit., pp. 108-113.

solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India'.

"In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention 'considers India to be a member of the Organization'."

326. Cambodia also made an ambiguous declaration with regard to the same Convention establishing IMCO.[469] Several Governments stated "that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention". Accordingly, "[i]n a communication addressed to the Secretary-General on 31 January 1992, the Government of Cambodia stated that '... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained [in the second part of the declaration?], on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia'".[470]

327. In the view of the Special Rapporteur, it is far from obvious that a simple interpretative declaration can be assimilated to a purely political declaration and be void of any legal effect.[471] Yet these precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting parties.

328. This discrepancy is of great practical significance. Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way. As Professor McRae writes, "[t]he significance of the former lies in the effect it may have in subsequent proceedings to interpret the treaty, and this significance will vary according to whether the declaration has been accepted, ignored or objected to by other contracting parties. The latter type of interpretative declaration, on the other hand, must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or to modify the terms of the treaty."[472]

---

[469] For text, see *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XII.1, pp. 640-641. Regarding this episode see in particular D. M. McRae, op. cit., pp. 165-166 and Rosario Sapienza, op. cit., pp. 177-178.

[470] Ibid., p. 658, note 10. See also note 388 above.

[471] It is interesting that Indonesia, which made a declaration comparable to the one made by India and encountered similar reactions, also admitted that its declaration constituted an interpretation of article 1 (b), but added that it could not accept the assumption made by the Governments that had raised an objection "that this declaration has no legal effect with regard to the interpretation of the Convention" (ibid., p. 659, note 12); this position appears to have legal merit. The legal effects of interpretative declarations, along with those of reservations, will be considered in greater detail in a later report.

[472] D. M. McRae, op. cit., p. 172.

329. The Special Rapporteur does not think that this last formula is quite accurate: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the State or organization formulating it, but to impose a specific interpretation on those provisions. Even if the distinction is not always obvious, there is a tremendous difference between application and interpretation. "The mere fact that a ratification is conditional does not necessarily mean that the condition needs to be treated as a reservation."[473]

330. This is in fact the direction taken in jurisprudence:

(a) In the *Belilos* case, the European Court of Human Rights considered the validity of Switzerland's interpretative declaration from the standpoint of the rules applicable to reservations, yet without assimilating one to the other;[474]

(b) Likewise, in a text that is admittedly a bit obscure, the Arbitral Tribunal that settled the dispute between France and the United Kingdom concerning the continental shelf in the *Mer d'Iroise* case analysed the third reservation by France concerning article 6 of the 1958 Geneva Convention "as a particular condition posed by the French Republic for its acceptance of the delimitation system provided for in article 6", adding: "To judge by its terms, this condition would seem to go beyond a simple interpretation".[475] This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

331. The fact remains that, even if it cannot be entirely "assimilated" to a reservation, a conditional interpretative declaration does come quite close, as Paul Reuter has written: *"[l']essence de la 'réserve' est de poser une condition: l'État ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation de celle-ci"* ("the essence of 'reservations' is to stipulate a condition: the State will commit itself only on condition that certain legal effects of the treaty are not applied to it, either by excluding or modifying a rule or by interpreting it").[476]

332. Nor does the Special Rapporteur agree with those criticisms levelled by Frank Horn at the distinction proposed by Professor McRae. Mr. Horn affirms that "[t]he character of a declaration as an absolute condition for participation in a treaty does not automatically turn it into an 'excluding' or 'modifying' device";[477] however, this clearly shows that their conditional character brings interpretative declarations quite close to reservations without assimilating them thereto, and thus it is incorrect to say that "[t]he 'excluding' or

---

[473] D. W. Greig, op. cit., p. 31.

[474] See para. 294 above. In the *Temeltasch* case, the European Commission of Human Rights was more cautious: completely (and intentionally) adhering to Professor McRae's position, it "assimilated" the notions of conditional interpretative declarations and reservations (decision of 5 May 1982, *Decisions and Reports*, April 1983, paras. 72-73, pp. 130-131).

[475] Decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, *United Nations Reports of International Arbitral Awards*, vol. XVIII, para. 55, p. 169.

[476] Paul Reuter, *Introduction au droit des traités*, 3rd ed., revised and expanded by Philippe Cahier (Paris, PUF, 1995), p. 71. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of Harvard Law School (see para. 97 above; see also Frank Horn, op. cit., p. 35 and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations; it was subsequently abandoned in circumstances that are not clear (see paras. 57-61 above).

[477] Ibid., p. 239.

'modifying' effect can only be asserted at the very moment one of the many possible interpretations is finally authoritatively established as the only right and valid one".[478] An authentic or jurisdictional interpretation that is contrary to one put forward by the declarant will establish that the latter's interpretation was not the "right" one, but it will not make the interpretative declaration into a reservation. All one can conclude is that interpreting declarations in different ways will create complex problems if the initial interpretative declaration was conditional, and these difficulties should be taken into consideration when the Commission considers the legal rules applicable to conditional interpretative declarations.

333. Likewise, it is doubtless excessive going too far to maintain that the distinction between simple and conditional interpretative declarations "puts the other States in a very difficult if not impossible position".[479] They may in fact react differently to different declarations, so that it may be necessary to spell out as clearly as possible both the criteria for making the distinction and the legal regime applicable to both. However, one cannot conclude that, just because it may be difficult to make the distinction in some cases, the distinction does not exist.

334. The present report, which is devoted exclusively to defining reservations and, by way of contrast, interpretative declarations, is not the place in which to dwell at length on the consequences of the distinction between the two types of interpretative declaration. However, it now seems fairly obvious that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations than would the rules applicable to simple interpretative declarations, which essentially fall under the "general rule of interpretation" codified in article 31 of the 1969 and 1986 Vienna Conventions. In the case of conditional interpretative declarations, strict rules, particularly as regards time limits, must be followed in order to prevent, insofar as possible, disputes among the parties as to the reality and scope of their commitment under the treaty. Such precautions are less indispensable in the case of simple interpretative declarations.

335. In view of the foreseeable consequences of the distinction and its practical importance, it should be included in the Guide to Practice. However, bearing in mind the striking degree to which reservations overlap with conditional interpretative declarations, it would be preferable, before suggesting a definition for the latter, to explore the appropriateness of including in the definition of conditional interpretative declarations the *ratione temporis* element, which is an integral part of the definition of reservations.

iii. The temporal element of the definition

336. One of the major elements of the definition of reservations concerns the moment at which a unilateral declaration must be formulated in order to qualify as a reservation. While this stipulation would seem to have more to do with the legal regime of reservations than with their actual definition, practical considerations aimed at preventing abuses have resulted in its becoming an element of the definition.[480] These considerations do not carry the same weight in the case of interpretative declarations, at least those that the declarant formulates without making the proposed interpretation a condition for participation in the treaty.

337. Although it is not possible to discuss the legal regime applicable to interpretative declarations in detail, it bears repeating that such declarations[481] are governed by the rules

[478] Ibid.

[479] Sir Ian Sinclair, op. cit., p. 53.

[480] See paras. 135-146 above.

[481] See paras. 307 ff. above.

of interpretation of treaties, which themselves are placed closely in the Vienna Convention, and rightly so, to the rules governing the application of treaties. Thus, even if an instrument made by a party "in connection with the conclusion of the treaty" can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the "context", as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take "into account, together with the context", any subsequent agreement between the parties and any subsequent practice followed. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at its conclusion, at the time a State or international organization expresses its final consent to be bound, or at the time of application of the treaty.[482] If the interpretation proposed by the declarant is accepted, expressly or implicitly, by the other contracting parties, the interpretative declaration constitutes an element of a subsequent agreement or practice.

338. This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

> "during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the 'subsequent practice'".[483]

339. Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice, even if – it goes without saying – it is quite often at the moment they express their consent to be bound that States and international organizations do formulate such declarations.

340. It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the "declaration" made by Yugoslavia in respect of the 1971 Seabed Treaty[484] or of the declaration made by Egypt regarding the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[485] In these two cases, the "declarations" elicited protests on the part of the other contracting parties, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only "when signing, ratifying, accepting, approving, ... confirming or acceding to this Convention".

341. One can conclude *a contrario* that if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

---

[482] This last possibility was recognized by the International Court of Justice in its *Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa*: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (*I.C.J. Reports 1950*, pp. 135-136); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

[483] *Yearbook ... 1964*, vol. II, p. 52.

[484] See note 377 above.

[485] See *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXVII.3, note 4, pp. 930-932.

342. This is in fact quite normal in practice. It should be pointed out, as Professor Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting parties, States or international organizations often go on to propose their own interpretation of the treaty's provisions.[486] There is no *prima facie* reason not to consider such "counter-proposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant; however, they are by definition formulated after the time at which formulation of a reservation is possible.

343. Under these circumstances, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

344. This silence should not lead one to conclude, however, that an interpretative declaration may in all cases be formulated at any time:

(a) For one thing, this might be formally prohibited by the treaty itself;[487]

(b) Furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration at any time in the life of the treaty: such laxity would cast an unacceptable doubt on the reality and scope of the treaty obligations;

(c) And lastly, even simple interpretative declarations can be invoked and modified at any time only to the extent that they have not been expressly accepted by the other parties to the treaty or that an estoppel has not been raised against them.

345. These are questions that will have to be clarified in chapter II of the Guide to Practice, on the formulation of reservations and interpretative declarations. At the very most, one can imagine including in the definition of conditional interpretative declarations an express mention of the *ratione temporis* limitation on their formulation. This is justified for reasons comparable to those that have made such a clarification necessary in the area of reservations: by definition such declarations constitute conditions on the declarant's participation in the treaty and are thus, like reservations themselves, closely linked to the entry into force of the treaty.

346. For these reasons it would seem useful to reintroduce the *ratione temporis* element into the definition of conditional interpretative declarations, since it is one of the distinguishing features of reservations, even though it does not belong in the definition of interpretative declarations in general.

Guide to Practice:

"1.2.4 A unilateral declaration formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making notification of succession to a treaty, whereby the State or international organization subordinates it consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall

[486] D. W. Greig, op. cit., pp. 24 and 42-45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations or the "counter-interpretation" of articles I and II of the Non-Proliferation Treaty made by the United States of America in reaction to point 8 of the Italian declaration concerning that treaty.

[487] See para. 340 above.

constitute a conditional interpretative declaration [which has legal consequences distinct from those deriving from simple interpretative declarations] "[488]

(iii) The proposed definition and its consequences

347. The definition of interpretative declarations does not appear in any of the provisions of the Vienna Conventions on the Law of Treaties. However, it would seem possible to elicit it by systematically contrasting it with the definition of reservations, as was done above. In addition, the definition used for interpretative declarations leads one to exclude from this category of unilateral declarations instruments that are sometimes and erroneously included.

a. The proposed definition

348. Although the International Law Commission ultimately decided that there was no point in including a definition of interpretative declarations in its 1966 draft articles on the law of treaties,[489] the Commission did discuss this idea several times during its preparation of the text.

349. While the first two Special Rapporteurs, Brierly and Lauterpacht, neglected to define interpretative declarations, Fitzmaurice did: in his very first report, in 1956, he defined interpretative declarations negatively by contrasting them with reservations, specifying that the term "reservation"

> "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty."[490]

350. This was a "negative", or "reverse" definition, however, which made it clear that reservations and interpretative declarations were separate legal instruments but did not positively define what was meant by the term "interpretative declaration". Moreover, the wording used *in fine*, which, one assumes, was probably intended to cover what this report refers to as "conditional interpretative declarations", lacked precision, to say the least.

351. This second flaw was partially corrected by Sir Humphrey Waldock, who, in his first report, submitted in 1962, removed some of the ambiguity that marked the final part of the definition proposed by his predecessor, but again put forward an entirely negative definition:

> "An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation".[491]

352. This process makes it clear what an interpretative declaration is not; it is of little use in defining what it is, a question in which the Commission subsequently lost interest.[492]

353. It was this omission that Japan tried to fill when it noted, in its comments on the draft adopted by the Commission on first reading, that "not infrequently a difficulty arises in practice of determining whether a statement has the character of a [reservation] or of an

---

[488] The Special Rapporteur agrees that the phrase in square brackets goes beyond the strict framework of definitions which are the subject of this report; however, he feels that this information may be useful in justifying the emphasis placed on this distinction.

[489] See paras. 64-66 above.

[490] *Yearbook ... 1956*, vol. II, p. 110, document A/CN.4/101.

[491] *Yearbook ... 1962*, vol. II, p. 32, document A/CN.4/144.

[492] See paras. 60 ff. above. The commentary on draft article 2, paragraph 1 (d), however, stipulates that a declaration that is merely a "clarification of the State's position" does not "amount to a reservation" (*Yearbook ... 1966*, vol. II, p. 178).

[interpretative declaration]", and suggested "the insertion of a new provision ... to overcome the difficulty".[493] However, the Japanese suggestion did nothing more than call for the addition of a paragraph to draft article 18 (subsequently article 19):

> "A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as [a] reservation".[494]

354. Here again, the definition of interpretative declarations was not a "positive" one, and the proposed addition had more to do with the legal regime of reservations than with their definition. Moreover, this proposal was incompatible with the definition of reservations that was ultimately selected, which rejected nominalism entirely.

355. Curiously, very few authors have hazarded any doctrinal definitions of interpretative declarations since the adoption of the Vienna Convention in 1969.

356. Frank Horn considers that "[a]n interpretative declaration is an interpretation, which is distinguished from other interpretations by its form and by the moment it is presented".[495] However, while this author devotes a long chapter to an attempt at "Clarifying the Concept of Interpretative Declarations",[496] he does not propose any definition in the true sense of the word. What is more, his underlying assumptions would seem debatable: from the foregoing, it appears that neither the form of these declarations nor the moment at which they are formulated can characterize them or distinguish them from reservations.

357. The definition of the term "understanding" given by Marjorie M. Whiteman[497] is more directly usable in that she considers interpretative declarations both as they relate to reservations (an understanding "is not intended to modify or limit any of the provisions of the treaty" and, positively, "is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty other than as a substantive reservation". As for the terms "declaration" and "statement", they "are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty".[498] Although there is no need to distinguish between these three terms, which, generally speaking, have no equivalent in languages other than English,[499] these definitions have the merit of highlighting certain indisputable characteristics of interpretative declarations:

(a) They seek to clarify or explain, not to modify or exclude;

(b) These clarifications or explanations are placed on record.

358. Finally, in his recent book on interpretative declarations, Rosario Sapienza bases himself on the following definition of interpretative declarations: they are the "*dichiarazioni unilaterali a mezzo delle quali gli Stati, al momento di manifestare la loro volontà ad obligarsi al rispetto del disposto di un trattato multilaterale (e talvolta anche semplicemente al momento della firma, pur se questa non rappresenti una vera e propria manifestazione di volontà ad obligarsi), chiariscono in una certa misura il loro punto di vista relativamente all'interpretazione di una disposizione del trattato stesso o a problemi connessi comunque all'applicazione del disposto di questa trattato*" ("unilateral declarations through which States, at the moment they express their commitment to be bound by the provisions of a

[493] Sir Humphrey Waldock, Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 46.

[494] Comments transmitted in a note verbale dated 4 February 1964, A/CN.4/175, p. 78, see also pp. 70-71.

[495] Frank Horn, op. cit., p. 237.

[496] Ibid., chapter 25, pp. 236-277.

[497] See note 383 above.

[498] *Digest of International Law* (Washington, D.C., 1970), vol. 14, pp. 137-138.

[499] See notes 382 and 383 above.

multilateral treaty (and occasionally even at the time of signature, although that does not constitute a true expression of obligation, strictly speaking), clarify, to a certain extent, their point of view with regard to the interpretation of a provision of the treaty itself or to associated problems or to the application of the treaty").[500]

359. Despite the excessive shades of meaning and ambiguity that surround some definitions (and the Special Rapporteur's disagreement in so far as the moment of the formulation of interpretative declarations is concerned), this one combines, in broad outline, the conclusions reached through the most systematic comparison possible of interpretative declarations with reservations.

360. It seems clear to the Special Rapporteur from the foregoing that, like a reservation, an interpretative declaration:

(a) Is a unilateral declaration made by a State or an international organization;

(b) However phrased or named, but which is distinguished by the fact that, if it is not conditional,[501] it can be formulated at any time;

(c) And that purports not to exclude or modify the legal effect of certain provisions of the treaty (or the treaty in its entirety[502]) in its application to that State or that international organization, but to clarify the meaning or scope attributed by the declarant to those provisions.

361. These are the elements that the Special Rapporteur believes ought to be included in the definition of interpretative declarations in the Guide to Practice:

Guide to Practice:

"*1.2 "Interpretative declaration" means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.*"

362. It goes without saying that, here again, this definition in no way prejudges the validity or the effect of such declarations.

363. Moreover, this definition has, in the eyes of the Special Rapporteur, the dual advantage of making it possible to distinguish clearly between reservations and interpretative declarations, while being sufficiently general to encompass different categories of interpretative declarations; in particular, it encompasses both conditional and simple interpretative declarations, the distinction between which is covered in draft guideline 1.1.4.

b. The distinction between interpretative declarations and other unilateral declarations made in respect of a treaty

364. Another advantage of the proposed definition lies in the fact that it also makes it possible to distinguish between interpretative declarations and other unilateral declarations formulated by a State or an international organization, possibly at the time of the declarant's expression of consent to be bound by the treaty, but which are neither interpretative declarations nor reservations and most likely have little to do with the law of treaties.

365. The extreme diversity of unilateral declarations made by a State "concerning" a treaty has already been stressed in this report: some of them are reservations in the sense of the

[500] Rosario Sapienza, op. cit., p. 1.

[501] With regard to this (important) exception, see draft guideline 1.2.4 above.

[502] Regarding this point, see draft guideline 1.1.4 above.

Vienna definition as draft guidelines 1.1.1 to 1.1.8 of the Guide to Practice endeavour to reflect it, while others are in fact intended to clarify the meaning or scope of the treaty in question and merit the name "*interpretative* declarations"; still others, however, lack any clear character and cannot be placed in either of the above categories.

366. Some of these atypical declarations have already been considered above. Examples include:

(a) A unilateral declaration that is used by its author to make commitments that go beyond the obligations imposed by the treaty in respect of which the declaration is made;[503]

(b) A declaration that can be construed as an offer to add a new provision to the treaty;[504]

(c) A "declaration of non-recognition", when the declaring State does not intend to prevent application of the treaty in its relations with the unrecognized entity.[505]

367. However, this list is far from being exhaustive: the signing of a treaty by a State or an international organization or the expression of its consent to be bound can be, and frequently are, the occasion for declarations of all sorts that do not seek to exclude or modify the legal effect of the provisions of the treaty or to interpret them.

368. This is the case when a State expresses, in one of these situations, its opinion, positive or negative, with regard to the treaty, and even sets forth improvements that it feels ought to be made as well as ways of making them. Declarations by several States regarding the Convention of 10 October 1980 on prohibitions or restrictions on the use of certain conventional weapons afford some notable examples:

(a) "1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980.

"2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace.

"3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a State victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course";[506]

---

[503] See paras. 212-216 above and draft guideline 1.1.5.

[504] See paras. 224-226 above and draft guideline 1.1.6 *in fine*.

[505] See paras. 168-181 and, *a contrario*, draft guideline 1.1.7.

[506] *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXVI.2, p. 897; see also the declarations made by the United States of America (ibid., pp. 899-900) and Romania (ibid., p. 899).

(b) "After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, the French Government, as it has already had occasion to state

"through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980;

"on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly;

"Regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to.

"It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling that gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto."[507]

369. These are simple observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application.[508]

370. This is also the case also when a State makes a declaration in which it calls on all or some other States to become parties to a treaty[509] or to implement it effectively.[510]

371. The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Test-Ban Treaty adopted by the General Assembly on 10 September 1996:

[507] Ibid., pp. 897-898; see also the declaration made by Italy (ibid., p. 898).

[508] See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two Additional Protocols of 1977 to the Geneva Conventions of 1949 (text attached to the reply from the Holy See to the questionnaire on reservations to treaties).

[509] See the declaration by the United States of America concerning the same Convention: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (ibid., p. 899); or the one by Japan concerning the NTP: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (United Nations, *Treaty Series*, vol. 1035, pp. 342-343).

[510] See the declaration by China concerning the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons: "III. States Parties that have abandoned chemical weapons on the territories of other States Parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (*Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chapter XXVI.3, p. 905).

> "1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world ..."[511]

Similarly, when it became a party to the Convention on the Rights of the Child, the Holy See (among others) made the following declaration:

> "By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families ..."[512]

372. In the same spirit, Luigi Migliorino notes that some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it: "Their main purpose is to avoid that the Treaty prejudice the positions of States making the declaration with respect to certain issues of the law of the sea on which States have different positions and views".[513]

373. What these diverse declarations have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they have no effect on its implementation, nor do they seek to.

374. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized) or in determining the legal regime applicable to them.

375. The Special Rapporteur believes that it would be useful to spell this out in order to avoid any confusion. That is the intention of the following draft guideline:

> *Guide to Practice:*
>
> *"1.2.5 A unilateral declaration formulated by a State or an international organization when that State or international organization expresses its consent to be bound which does not purport to exclude or modify the legal effect of the treaty in its application to that State or that international organization, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties]."*[514]

376. A somewhat different situation from those described above concerns what one might call "informative declarations", whereby the formulating State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty.

377. Frank Horn, who calls these "declarations of domestic relevance", provides a series of examples concerning United States practice, placing them in three categories: "Statements

---

[511] Ibid., chapter XXVI.4, p. 907.

[512] Ibid., chapter IV.11, p. 208; see also the aforementioned declaration by the Holy See (note 503) on the subject of the 1977 Protocols additional to the 1949 Geneva Conventions: "Finally, the Holy See reasserts, on this occasion, its strong conviction as to the fundamentally inhumane nature of war ..."

[513] Migliorino, op. cit., p. 107; see also pp. 115 ff and p. 119.

[514] The phrase in square brackets merits the same observation as the one contained in note 318 regarding draft guideline 1.1.5: the Special Rapporteur is aware that this phrase goes beyond the simple framework of definitions under consideration in this part of the Guide to Practice; however, as there will be no opportunity to come back to this type of declaration (which, being neither a reservation nor an interpretative declaration, does not fall within the scope of the topic), it seems to him that this information may be useful.

initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level or by means of agreements of a specific kind with the other parties, or they may let certain measures of implementation pend later authorization by Congress".[515]

378. Authorization to ratify the Statute of the International Atomic Energy Agency (IAEA) was given by the United States Senate,

> "subject to the interpretation and understanding which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent".[516]

379. This declaration was attached to the United States instrument of ratification (the State party called it an "interpretation and understanding"), with the following explanation:

> "The Government of the United States of America considers that the above statement of interpretation and understanding pertains only to United States constitutional procedures and is of a purely domestic character".[517]

380. Occasionally, however, the distinction between an "informative" declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the questionnaire on reservations.[518] "It should be noted that some of the declarations being referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague". By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, stated:

> "The reason for the declaration ... was not only to provide information on which Swedish authorities and bodies would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities".

381. Here one can probably say that this is really a reservation by means of which the author seeks to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a true interpretative declaration explaining how Sweden understands the treaty. But this is not the case with purely informative declarations, which, like those of the United States cited earlier,[519] cannot have any international effect and concern only relations between Congress and the President.

382. The problem arose in connection with a declaration of this type made by the United States in respect of a treaty concluded with Canada in 1950 on the subject of the Niagara River. The Senate would only authorize ratification through a "reservation" that specifically

---

[515] Frank Horn, op. cit., 1988, p. 102.

[516] Text in Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, p. 191; see also the "interpretation and explanation" attached to the instrument of ratification of the Convention establishing the Organisation for Economic Cooperation and Development (OECD).

[517] Ibid., pp. 191-192.

[518] Response to question 3.1.

[519] Paras. 379-381.

identified the competent national authorities for the American side;[520] this reservation was transmitted to Canada, which accepted it, stating that it did so "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty".[521] Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the "reservation" had not modified the treaty in any way, and that since it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law.[522] This reasoning is further upheld[523] by the fact that the declaration did not purport to produce any effect at the international level.

383. For the same reasons it would be difficult to call this declaration an "interpretative declaration": it does not interpret one or more of the provisions of the treaty but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that "informative declarations" are not systematically attached to the instrument by which the country expresses its consent to be bound by a treaty;[524] this clearly demonstrates that they are exclusively domestic in scope.

384. Accordingly, it would seem valid to say that "informative" declarations, which simply give indications of the manner in which the State or international organization plans to implement the treaty at the internal level, are not interpretative declarations, even though, unlike the declarations mentioned above,[525] they are directly linked to the treaty.

385. For this reason, it appears that they ought to be covered by a separate provision of the Guide to Practice.

Guide to Practice:

"*1.2.6 A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration.*"

(c) Putting the distinction into action

386. It is apparent from the foregoing that interpretative declarations are distinguished from reservations principally by the objective which the State or international organization sets when making them: by formulating a reservation, the authors seek to exclude or modify the legal effect of some of the provisions of a treaty (or the treaty in its entirety) as they apply to them; by making an interpretative declaration, they seek to clarify the meaning and the scope they attribute to the treaty or to certain of its provisions.

---

[520] This famous declaration is known as the "Niagara reservation"; see Louis Henkin, "The treaty makers and the law makers: the Niagara reservation", *Columbia Law Review*, 1956, pp. 1151-1182.

[521] Quoted by Marjorie M. Whiteman, op. cit., p. 168.

[522] *Power of Authority of the State of New York v. Federal Power Commission*, 247 F 2d 538-544 (D.C. Cir, 1957); for a fuller account of the case, see Marjorie M. Whiteman, op. cit., pp. 165-169; William W. Bishop, Jr., "Reservations to treaties", op. cit., pp. 317-322; or Frank Horn, op. cit., pp. 107-108.

[523] The fact that the "Niagara reservation" was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a "reservation" to a bilateral treaty can be viewed as an offer to renegotiate (see sect. 2 below), which, in this case, Canada accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have "objected" to a declaration that did not concern it.

[524] See David Hunter Miller, *Reservations to treaties - their effect and the procedure in regard thereto*, op. cit., pp. 170-171; or Marjorie M. Whiteman, op. cit., pp. 186 ff.

[525] Paras. 370-377.

387. As to the equally important distinction between simple interpretative declarations and conditional interpretative declarations, it, too, is based on the declarant's intentions: in both cases, the author seeks to interpret the treaty, but in the first, the interpretation in question is not made a condition for participation in the treaty, whereas in the second, it is inseparable from the expression of the declarant's consent to be bound.

388. These distinctions are fairly clear as to their principle, yet they are not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section is to provide some information regarding the substantive rules[526] that should be applied in order to distinguish between reservations and interpretative declarations and, within the latter category, between conditional declarations and conditional interpretative declarations.

(i) Stating the problem – the "double test"

389. It has been written that, "[i]n the relations of men and nations it always seems rational to look at the substance rather than the form in appraising communications. But, a substance test throws a burden on those at the receiving end (or tribunals that may decide disputes) to recognize a statement for what it is rather than for what it is titled".[527]

390. It is necessary first of all to agree on the nature of this "material test". In fact, it is a double test, one that is both subjective (what did the declarant *want* to say?) and objective (what did he *do*?)

391. Notwithstanding what has occasionally been written, these two questions are alternatives: the first helps determine whether an interpretative declaration is conditional or not, and the second distinguishes interpretative declarations from reservations.

392. In reality, the second question tends to overshadow the first insofar as the distinction between reservations and interpretative declarations is concerned. While article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions defines the term "reservation" as a unilateral declaration by means of which a State or an international organization "*purports* to exclude or to modify the legal effect of certain provisions of the treaty", the actual criterion has its basis in the effective result of the declaration: if implementing of the declaration results in a modification or exclusion of the legal effect of the treaty or certain of its provisions (as would happen when the rules of the law of treaties were applied normally in the absence of a declaration), then the statement is a reservation, "however phrased or named"; if the declaration simply clarifies the meaning or scope that its author attributes to the treaty or to certain of its provisions, it is an interpretative declaration. If it does none of this, then it is a unilateral declaration that is made "in connection with the treaty" but has no connection to the law of treaties nor, in the view of the Special Rapporteur, to the topic under consideration.[528]

393. There exist in jurisprudence some formulas which imply that the objective test should be combined with the subjective test in order to determine whether a text is a reservation or an interpretative declaration. For example, in the *Belilos* case, "[l]ike the Commission and the Governmen[illegible], the Court recognizes that it is necessary to ascertain *the original*

[526] The rules of procedure concerning the formulation of reservations, interpretative declarations, acceptances and objections will be the subject of a detailed study and draft guidelines in the Special Rapporteur's next report.

[527] Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law 1989*, pp. 368-369; see also D. W. Greig, para. 297 above.

[528] See in particular draft guidelines 1.1.5, 1.2.5 and 1.2.6.

intention of those who drafted the declaration".[529] Likewise, in the *Mer d'Iroise* case, the Franco-British Arbitral Tribunal held that, in order to determine the nature of the reservations and declarations made by France regarding the 1958 Convention on the Continental Shelf, "[t]he question [was] one of *the respective intentions* of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...".[530]

394. The problem is poorly stated: certainly, the declarant's intention is important (does he seek to exclude or to modify the legal effect of the provisions of the treaty?). But to answer this question, it is necessary, and sufficient, to note what the consequence would be of implementing the declaration. The two tests thus overlap, and the answer to the second question makes it possible to answer the first at the same time. This was in fact the reasoning followed both by the European Court of Human Rights and the Arbitral Tribunal in the *Mer d'Iroise* case.

395. Some authors think it useful to complicate the first problem further by pointing out that if a State has given, when expressing its consent to be bound, an interpretation that subsequently proves to be erroneous because it is rejected by a judge or arbitrator or body competent to issue an authoritative interpretation, the nature of the interpretative declaration is retroactively modified: "The statement's nature as a reservation is established at the same time the propagated interpretation is established".[531]

396. To the Special Rapporteur, this is just another artificial complication: it is true that if an authentic or authoritative interpretation comes to light after the declarant put forward his own interpretation, that interpretation is called into question, but this in no way modifies the *nature* of the original unilateral interpretation: it stands. The interpretation is revealed to be erroneous, and the question arises as to what *effects* it now has. The problem of definition is solved, to be replaced by the problem of the regime of simple or conditional interpretative declarations.[532]

397. On the other hand, the answer to the first question (what was the declarant's intention?) is crucial in distinguishing conditional interpretative declarations from simple interpretative declarations. In other words, does the interpretation put forward by the State or international organization constitute a condition for its participation in the treaty or not? If not, the declaration is a simple interpretative declaration; if so, it is a conditional interpretative declaration.

398. Thus there is not really any "double test", but rather a succession of questions. Faced with a unilateral declaration by a State or an international organization on the subject of a treaty, one must ask in succession the following questions: does the declaration have the effect of excluding or modifying the legal effect of the provisions of a treaty? if the answer to this (objective) question is affirmative, one need go no further: the declaration is a reservation; it is only when the answer is negative and the effect of the declaration is in fact only a clarification of the meaning or scope of the treaty that one need ask a second (subjective) question: does the proposed interpretation constitute, for the declarant, a condition of his participation in the treaty?

---

[529] European Court of Human Rights, 29 April 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 48, p. 23, emphasis added.

[530] Decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, *United Nations – Reports of International Arbitral Awards*, vol. XVIII, para. 30, p. 28, emphasis added.

[531] Frank Horn, op. cit., p. 326.

[532] See also para. 332 above.

399. The Special Rapporteur does not think it necessary to devote a specific guideline in the Guide to Practice to setting out the manner in which the problem is stated. This would seem to him to be sufficiently evident from the definition of reservations and interpretative declarations on the one hand and that of conditional interpretative declarations on the other. Nevertheless, should the Commission decide otherwise, one might contemplate "cautionary" guidelines drafted as follows:

[*Guide to Practice*:

"*1.3.0 The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.*"

"*1.3.0 bis The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.*"

"*1.3.0 ter The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.*"]

(ii) The prescribed methodology

400. Admittedly, the problem at hand and the test to solve it have no effect on the methodology used. In all cases, a unilateral declaration should be interpreted in terms of the circumstances of the situation; "[e]ach case must be considered on its own merits",[533] starting with the principle of the indifference of nominalism raised by the Vienna definition.

401. However, as established above, to make these determinations, there are valid reasons for preferring certain methods or certain indications of interpretation:

(a) As stipulated in draft guideline 1.2.2, the phrasing or name used by the declarant gives an indication of his intention which cannot be overlooked;

(b) This is particularly true when the State or international organization makes several separate declarations and takes care to title them differently (draft guideline 1.2.2);

(c) Or, when called upon to explain his position further, the declarant clarifies his intention;[534]

(d) And, bearing in mind the general presumption that States will behave in conformity with international law,[535] the State (or international organization) must, as stipulated in draft guideline 1.2.3, be assumed to have intended to make an interpretative

[533] Memorandum issued in 1950 by the United States Department of State to the Department of Labor, quoted by William W. Bishop, Jr., *United Nations – Reports of International Arbitral Awards* 1961-II, vol. 103, p. 304; see also Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, ninth ed., vol. I, *Peace* (London, Longman), p. 1242: "Whether [statements] constitute reservations is a question which can only be answered on the merits of each particular instance".

[534] See para. 264 or paras. 324-326 above.

[535] "There is well-established general principle of law that bad faith is not presumed" (arbitral decision of 16 November 1957, *Lac Lanoux* case (France/Spain), *RIAA*, vol. XII, p. 305); see Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)* (Paris, LGDJ, 1994), pp. 416-417; Frank Horn, op. cit., p. 326.

declaration and not a reservation if the treaty in respect of which the declaration is made prohibits reservations.

402. Nevertheless, there are often cases in which these indications are absent, since States and international organizations often do not give names to the unilateral declarations they formulate and the treaty may not contain a reservations clause. In any case, none of these presumptions is irrefragable.

403. These presumptions should then be confirmed, or their absence offset, by turning to the normal rules of interpretation in international law. "Discerning the real substance of the often complex statements made by States upon ratification of, or accession to a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation".[536]

404. More precisely, there is justification for turning to the rules of interpretation of treaties. Whether the unilateral declarations are reservations or interpretative declarations, they are clearly legal instruments distinct from the treaty with which they are associated,[537] but unlike general policy declarations[538] or purely "informative" declarations,[539] they are inextricably linked with treaty whose meaning they seek to interpret or of whose provisions they purport to exclude or modify the legal effect.

405. This was clearly highlighted by the Inter-American Court of Human Rights in its advisory opinion of 8 September 1983 concerning the death penalty:

> "Reservations have the effect of excluding or modifying the provisions of a treaty and they become an integral part thereof as between the reserving State and any other States for whom they are in force. Therefore, ... it must be concluded that any meaningful interpretation of a treaty calls for an interpretation of any reservation made thereto. Reservations must of necessity therefore also be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself."[540]

406. No doubt the San José Court had in mind the rules applicable to the interpretation of reservations, but, *mutatis mutandis*, this reasoning can be applied to cases where the thing that is to be determined is not the meaning of a reservation but, backing up a step, the legal nature of a unilateral declaration linked to a treaty. In practice this is often how judges and arbitrators proceed when confronted with a problem of this type.

407. In all cases of which the Special Rapporteur is aware, the "general rule of interpretation" set out in article 31 of the Vienna Convention[541] has been implemented as

---

[536] Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, p. 10.

[537] See paras. 123-129 above.

[538] See draft guideline 1.2.5.

[539] See draft guideline 1.2.6.

[540] Advisory opinion OC-3/83, para. 62, p. 84.

[541] Article 31: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties

a matter of priority; where necessary, this rule has been supplemented by recourse to the "supplementary means of interpretation" contemplated in article 32.[542] In its 1983 opinion, the Inter-American Court of Human Rights explained itself in the following terms:

> "It follows that a reservation [but this holds true in general for any unilateral declaration that relates to the provisions of a treaty] must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservations form an integral part.[543] This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> "The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty (Vienna Convention, Art. 19). Thus, without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text. A different approach would make it extremely difficult for other States Parties to understand the precise meaning of the reservation".[544]

408. Even though doctrine has barely contemplated the problem from this standpoint,[545] jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

(a) "This condition [imposed by the third French reservation to article 6 of the Seabed Convention], *according to its terms*, appears to go beyond mere interpretation ... the Court, ... accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'";[546]

(b) "In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration* and the *travaux préparatoires* which preceded Switzerland's ratification of the [European] Convention [on Human Rights].

---

regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

[542] Article 32: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

[543] The Special Rapporteur has some hesitation with regard to this wording: a reservation (or a declaration) is an integral part of the State's expression to be bound, but not, strictly speaking, of the treaty itself.

[544] Advisory opinion of 8 September 1983, OC-3/83, concerning the death penalty (art. 4, paras. 2 and 4, of the Inter-American Convention on Human Rights), paras. 63 and 64, pp. 84-85.

[545] See, however, Frank Horn, op. cit., pp. 263-272, and, for a clearer and more concise account, D. W. Greig, op. cit., p. 26.

[546] Arbitral decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, *United Nations – Reports of International Arbitral Awards*, vol. XVIII, para. 55, pp. 169-170; emphasis added.

"The Commission considers that *the terms used, taken by themselves*, already show an intention by the Government to prevent ...

[...]

"*In the light of the terms used* in Switzerland's interpretative declaration ... and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation";[547]

(c) "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content*";[548]

(d) "If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words 'is not applicable'".[549]

409. Stranger still, bodies that have had to rule on problems of this type have, in order to bolster their arguments, at times "jumped" directly from the terms of the declaration to be interpreted to the *travaux préparatoires*, barely touching on its context (even though it is specifically mentioned in the general rule of interpretation in article 31 of the 1969 Convention, while recourse to the *travaux préparatoires* is only one of the "supplementary means of interpretation" discussed in article 32).

410. In the *Belilos* case, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation",[550] "[l]ike the Commission and the Government, ... recognizes that it is necessary to ascertain the original intention of those who drafted the declaration" and, in order to do so, takes into account the preparatory work on the declaration,[551] as the Commission had done in the same case and in the *Temeltasch* case.[552]

411. It is true that this relatively intensive recourse to the preparatory work has been carried out by bodies established in connection with the European Convention on Human Rights; neither the Franco-British Arbitral Tribunal in the *Mer d'Iroise* case nor the Human Rights Committee in the case of *T. K. v. France* makes the slightest mention of it.

---

[547] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 74, 75 and 82.

[548] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 49, p. 24. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work" (ibid., para. 41, p. 21); the Commission, more clearly than the Court, gave priority to the terms used in the Swiss declaration (para. 93 of the Commission's report; see the commentary by Iain Cameron and Frank Horn, op. cit., pp. 71-74).

[549] Human Rights Committee, Communication No. 220/1987, decision of 8 November 1989, *T. K. v. France*, report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), annex X, para. 8.6, p. 123.

[550] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 44, p. 22.

[551] Ibid., para. 48, p. 23.

[552] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 76-80, pp. 131-132.

412. Such caution is justified. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation".[553] Still, in the everyday life of the law, it would appear difficult to recommend that *travaux préparatoires* be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: they are not always made public,[554] and in any case it would be difficult to require foreign Governments to do so.

413. On the other hand, in view of these precedents, it would not be reasonable to exclude any recourse to the *travaux préparatoires*.

414. The balance between these contradictory considerations is, frankly speaking, adequately struck in articles 31 and 32 of the 1969 Vienna Convention, which give preference to the "general rule of interpretation" based on interpreting the treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, without excluding, where necessary, recourse to "supplementary means of interpretation". In the view of the Special Rapporteur, these rules can and should be applied not only when interpreting reservations and interpretative declarations, but also when determining their nature.

Guide to Practice:

"*1.3.1 To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.*

Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities."

(d) Conclusion of section 1

415. The function of the draft guidelines proposed in this section must be appreciated for what they are: an effort to limit uncertainties by helping decision-makers determine the nature of unilateral declarations they intend to formulate in respect of a treaty and, above all, characterize certain declarations made by other States or international organizations with a view to reacting to them appropriately.

416. One point must be stressed: it is only definitions that are at issue here, and this marks the dual limit of this exercise. Firstly, they do not in any way prejudge the validity of the unilateral declarations they describe; and, secondly, these definitions are of necessity general frameworks, and it would be naive to hope that they are sufficient in themselves to eliminate any classification problems in the future.

417. The first point needs little explanation. Defining is not regulating. "*Énonciation des qualités essentielles d'un objet*"[555] ("A statement of the essential qualities of an object"),

---

[553] Sir Robert Jennings and Sir Arthur Watts, op. cit., p. 1242. The authors cite as proof the Judgment of the International Court of Justice of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1979*, vol., p. 32.

[554] In the *Belilos* case, the representative of the Swiss Government referred to the internal debates within the Government but took cover behind their confidential nature (see Iain Cameron and Frank Horn, op. cit., p. 84).

[555] *Grand Larousse encyclopédique*.

a definition has as its sole function the placing of an individual declaration in a general category. This classification, however, in no way prejudges the validity of the declarations it describes: a reservation may be permissible or impermissible, but it is still a reservation if it corresponds to the chosen definition, and the same holds true for interpretative declarations.

418. Going even further, one could say that accurately determining the nature of a declaration is the indispensable prerequisite for the application of a particular legal regime, and precedes the determination of its permissibility. It is only after a particular instrument has been defined as a reservation that one can decide whether or not it is permissible and determine its legal scope, and the same is true for interpretative declarations.

419. In order to avoid any ambiguity, it might be useful to spell this out in the Guide to Practice:

Guide to Practice:

"*1.4 Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition.*"

420. Regardless of how carefully reservations are defined and distinguished from interpretative declarations and other types of declaration made in respect of treaties, some uncertainty will always persist. It is inherent in any attempt at interpretation. "While analysing the definition of reservation one must bear in mind certain natural limits of the practical usefulness of all definitions and descriptions accepted in this regard. It must be remembered that neither the description contained in the Vienna Convention nor the definition itself, be it formulated with utmost care, can prevent difficulties that might appear in practice while evaluating the character of certain declarations. The difficulties have their source in the subjectivism of evaluations. The situation is made worse by the fact that such declarations are frequently formulated in a vague or even ambiguous manner. Such situations are especially probable in cases of interpretative declarations of all kinds."[556]

421. To counter this drawback, the only solution is not, obviously, to refine the definitions further but for States and international organizations to endeavour to "play fair" and formulate declarations whose content is clear, spelling out their nature with precision. One should not harbour too many illusions in this regard: while ambiguities may be unwitting in some cases, they are all too often deliberate and correspond to political objectives from which no guide to practice will ever be able to dissuade decision-makers.

---

[556] Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law 1970*, p. 297.

United Nations A/CN.4/491/Add.5

General Assembly

Distr.: General
17 July 1998
English
Original: French

International Law Commission
Fiftieth session
Geneva, 20 April–12 June 1998
New York, 27 July–14 August 1998

Third report on reservations to treaties

by Mr. Alain Pellet, Special Rapporteur

Addendum

Contents

		Paragraphs	Page
Section 2.	"Reservations" and interpretative declarations in respect of bilateral treaties	422–521	3
1.	"Reservations" to bilateral treaties	426–493	3
(a)	The difficulty in interpreting the silence of the Vienna Conventions on reservations to bilateral treaties	427–445	4
(i)	The 1969 Convention on the law of treaties	428–439	4
(ii)	The 1986 Convention on treaties concluded by international organizations	440–443	8
(iii)	The 1978 Convention on succession of States in respect of treaties	444–445	9
(b)	The practice of States with regard to reservations to bilateral treaties	446–465	9
(c)	The legal nature of "reservations" to bilateral treaties	466–493	14
(i)	The moment when "reservations" to bilateral treaties are formulated	468–472	14
(ii)	"Reservations" to bilateral treaties do not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author	473–476	15
(iii)	"Reservations" to bilateral treaties are proposals to amend	477–493	16

98-21053 (E) 300798 310798

2. Interpretative declarations made in respect of bilateral treaties 494–52

(a) The practice of interpretative declarations made in respect of bilateral treaties 496–50

(b) Features of interpretative declarations made in respect of bilateral treaties 504–52

Section 3. Alternatives to reservations (postponed) 52

Section 2. "Reservations" and interpretative declarations in respect of bilateral treaties

20

20

23

28

422. Although it would appear simple, the question of reservations to bilateral treaties is one of those that elicits the most questions and controversies, either because such reservations are considered impossible, or because they are likely to create major problems, or because emphasis is placed on the special regime applicable to them.

423. Since the Special Rapporteur's preliminary report[557] was considered in 1995, members of the Commission have taken somewhat divergent positions with regard to the importance, or even the existence, of reservations to bilateral treaties. While some members felt that such reservations were a particularly important aspect of the topic,[558] others felt that they could be summarized briefly, or even ignored altogether,[559] largely because they were not really reservations[560] or because they were governed by a logic quite different from that underlying multilateral treaties.[561]

424. Although the Special Rapporteur has said that he leans more towards the second viewpoint, he has agreed to prepare a study without any preconceived notions on the subject.[562] That is the purpose of this section.

425. It does in fact seem appropriate to him to link the question of reservations to bilateral treaties with the question of the definition of reservations, since the principal point of disagreement concerns the determination of whether what some States and authors term "reservations" to bilateral treaties are in fact reservations. Accordingly, he will endeavour to answer this question by looking at the practice of States in this area and the way the question is dealt with by doctrine in the provisions of the Vienna Conventions of 1969 and 1986 and their *travaux préparatoires*. This analysis will be supplemented by a look at the specific problems posed by the formulation of interpretative declarations in respect of bilateral treaties.

1. "Reservations" to bilateral treaties

426. A review of the text and the *travaux préparatoires* of the three Vienna Conventions on the law of treaties and the practice of States in this area results in ambiguous conclusions insofar as the possibility of attaching "reservations" to bilateral treaties is concerned.

---

[557] A/CN.4/470 and Corr.1.

[558] Mr. Lukashuk (20 June 1995, A/CN.4/SR.2402, pp. 15-16; 16 July 1996, A/CN.4/SR.2460, pp. 12-13; and 3 June 1997, A/CN.4/SR.2487, p. 12), Mr. He Qizhi (26 June 1997, A/CN.4/SR.2500, p. 22), Mr. Brownlie (ibid., p. 26) or Mr. Gocco (1 July 1997, A/CN.4/SR.2502, p. 5); see also some of the positions taken by representatives of States in the Sixth Committee ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session prepared by the Secretariat", A/CN.4/483, para. 93, p. 12).

[559] Mr. Rosenstock (16 June 1995, A/CN.4/SR.2401, p. 3), Mr. Rao (ibid., p. 19), Mr. Ferrari-Bravo (26 June 1997, A/CN.4/SR.2500, p. 22).

[560] Mr. Tomuschat (16 June 1995, A/CN.4/SR.2401, p. 4) and Mr. Yamada (29 June 1995, A/CN.4/SR.2407, p. 11). One member of the Sixth Committee also felt that "considering reservations to bilateral agreements would be equivalent to renegotiating those instruments" ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat", A/CN.4/472/Add.1, para. 168, p. 43).

[561] Mr. De Saram (22 June 1995, A/CN.4/SR.2404, p. 5) and Mr. Crawford (26 June 1997, A/CN.4/SR.2500, pp. 29-30).

[562] See statements made on 6 July 1995, A/CN.4/SR.12, p. 13; 3 June 1997, A/CN.4/SR.2487, pp. 16-17; and 27 June 1997, A/CN.4/SR.2501, p. 6.

However, with this study it is possible to formulate draft guidelines which the Special Rapporteur believes would, if adopted, resolve the persistent ambiguities in this area.

(a) The difficulty in interpreting the silence of the Vienna Conventions on reservations to bilateral treaties

427. The 1969 and 1986 Vienna Conventions say nothing about interpretative declarations made in respect of bilateral treaties, which is logical, since they do not take up the question of interpretative declarations. What is more surprising is that they are equally silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23, which set out their legal regime, raise or exclude the possibility of such reservations. Nowhere does the word "bilateral" appear.[563] And the 1978 Vienna Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(i) The 1969 Convention on the law of treaties

428. At best, one can say that article 20, paragraph 1, and article 21, paragraph 2, are directed at "the other contracting States [and contracting organizations]"or "the other parties to the treaty",[564] both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Conventions acknowledge the existence of reservations to bilateral treaties: the phrase "limited number of ... negotiating States" may mean "two or more States", but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.[565]

429. At first glance, the *travaux préparatoires* for this provision would seem to suggest that it does not concern bilateral treaties.

430. While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties,[566] in 1956 Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with

---

[563] This is also a dominant feature of the two Conventions as a whole: the word "bilateral" appears only once, in article 60, paragraph 1, concerning the termination or suspension of the operation of a treaty as a consequence of its breach (this peculiar feature was noted by Mr. Crawford during the discussion in the Commission in 1977 on reservations to treaties: 18 July 1997, A/CN.4/SR.2500, p. 28).

[564] See in this connection a remark by Mr. Calle y Calle during the preparation of the draft articles on treaties concluded by international organizations, *Yearbook ... 1981*, vol. I, p. 43 (1650th meeting, 13 May 1981).

[565] During the debate on this provision, Mr. Verdross said that "[t]he distinction between an ordinary *multilateral* treaty and a *multilateral* treaty concluded between a restricted group of States was not clear, since no numerical criterion was laid down by which to determine what constituted a 'restricted' group" (663rd meeting, 18 June 1962, *Yearbook ... 1962*, vol. I, p. 226, emphasis added); similarly: Mr. Tunkin (ibid., p. 227, and 664th meeting, 19 June 1962, ibid., p. 232).

[566] As early as 1950, the Commission stated that "the application ... in detail" of the principle that a reservation could become effective only with the consent of the parties "to the great variety of situations which may arise in the making of *multilateral* treaties was felt to require further consideration" (Report of the International Law Commission covering its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), para. 164, emphasis added). The study requested of the Commission in General Assembly resolution 478 (V) was supposed to (and did) focus exclusively on "the question of reservations to multilateral conventions".

limited participation, a category in which he expressly included bilateral agreements.[567] Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately.[568]

431. However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey's proposals were considered by the Drafting Committee in the same year.[569] The summary records of the discussion do not explain why this happened, but the explanation is most likely given in the introductory paragraph to the commentary on draft articles 16 and 17 (future articles 19 and 20 of the 1969 Convention) contained in the Commission's 1962 report and included in its final report in 1966:

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground."[570]

432. In a case that clearly illustrates this, the Government of the United States of America suggested, in its observations on the draft adopted on first reading, that the relevant section should be entitled "Reservations to multilateral treaties", to which the Special Rapporteur replied:

> "The articles [in this section] are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to multilateral treaties."[571]

While some members of the Commission expressed doubts,[572] the proposal was adopted by the Commission.[573]

433. Thus when it adopted the draft article (17, para. 2) which was the source of current article 20, paragraph 2, the text was contained in part II, section 2, entitled "Reservations to *multilateral* treaties".[574] In fact, all one can conclude from this is that, in the eyes of the Commission, the rules it had adopted were not applicable to reservations to bilateral treaties,

---

[567] See draft article 38 ("Reservations to bilateral treaties and other treaties with limited participation") which he proposed: "In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree" (*Yearbook ... 1956*, vol. II, p. 115).

[568] See draft article 18, paragraph 4 (a): "In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States" (*Yearbook ... 1962*, vol. II, p. 61).

[569] See draft article 18 *bis* proposed by the Drafting Committee (18 June 1962, 663rd meeting, *Yearbook ... 1962*, vol. I, p. 226).

[570] *Yearbook ... 1962*, vol. II, pp. 180-181, and *Yearbook ... 1966*, vol. II, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (*Yearbook ... 1962*, vol. II, p. 62; but see para. 432 below).

[571] Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 45.

[572] See in particular the comments by Mr. Ruda, who said that he preferred the title "'Reservations' because some of the provisions of the 1962 articles 18 to 22 ... could apply both to bilateral and to multilateral treaties" (797th meeting, 8 June 1965, para. 66, *Yearbook ... 1965*, vol. I, p. 154).

[573] See the report of the Commission to the General Assembly on the work of the first part of its seventeenth session, *Yearbook ... 1965*, vol. II, p. 161.

[574] Ibid. and Report of the Commission to the General Assembly on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202.

and it was pointless to adopt any rules adapted to cover such reservations, since they posed no problem. And yet the Commission also seemed to be acknowledging that reservations could be made to bilateral treaties.

434. However, even this general, subtle conclusion is cast into doubt by the positions taken during the Vienna Conference and the decision of that Conference to revert to the heading "Reservations" for part II, section 2, of the Vienna Convention on the Law of Treaties.

435. To begin with, it will be noted that France and Tunisia had submitted a joint amendment which reintroduced an explicit reference to reservations to bilateral treaties and sought to stipulate, in article 17, paragraph 2 (subsequently article 20, paragraph 2, of the Vienna Convention), that

> "A reservation to *a bilateral treaty* or to a restricted multilateral treaty requires acceptance by all the contracting States."[575]

Introducing this amendment, the representative of Tunisia said that the text as drafted by the Commission might lead erroneously to an excessively restrictive interpretation of the article "as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties".[576] The amendment was sent to the Drafting Committee[577] and dropped by the sponsors.[578]

436. However, a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations[579] was sent by the Committee of the Whole to the Drafting Committee,[580] which adopted it[581] and whose decision was recorded at the plenary meeting on 29 April 1969, after Mr. Yasseen, Chairman of the Drafting Committee, explained that the Committee had endeavoured not to prejudge the issue of the possible wording of reservations to bilateral treaties:

> "In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words 'to multilateral treaties' after the word 'reservations', since the adjective 'multilateral' did not modify the noun

---

[575] Document A/CONF.39/C.1/L.113; text also reproduced in United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records*, Documents of the Conference, United Nations, New York, 1971, "Reports of the Committee of the Whole", p. 239; emphasis added.

[576] United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1969, Committee of the Whole, 21st meeting, 10 April 1968, p. 111.

[577] Ibid., 25th meeting, 16 April 1968, p. 136.

[578] United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1970, Second session, Committee of the Whole, 84th meeting, 10 April 1969, p. 213; the representative of France explained that decision by the fact that "it would be for the States concerned to include in their treaties provisions allowing for the special nature of restricted multilateral treaties", although he made no mention of bilateral treaties.

[579] Document A/CONF.39/C.1/L.137; see also similar amendments submitted by China (A/CONF.39/C.1/L.13) and Chile (A/CONF.39/C.1/L.22).

[580] United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1969, Committee of the Whole, 20th meeting, 10 April 1968, p. 106.

[581] Document A/CONF.39/C.1/3 contains the Drafting Committee's decision on the titles of parts, sections and articles of the Convention and the statement by the Chairman of the Committee of the Whole at the Committee's 28th meeting (ibid., 18 April 1968, para. 2, p. 146).

'treaty' in the definition of a reservation given in article 2, paragraph 1 (d); that did not, of course, prejudice the question of reservations to bilateral treaties".[582]

437. However, the day after this decision was taken, the question occasioned an interesting exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee:

"19. **The President** said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.

"20. **Mr. Yasseen**, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.

"21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

"22. **The President** asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

"23. **Mr. Yasseen**, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

"24. **The President** said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties."[583]

438. Apparently, the Conference did not return to this question.

439. Commenting on this exchange of views, J. M. Ruda endorsed the statement by Mr. Ago: "This statement was not challenged and the Convention has no provisions regarding reservations to bilateral treaties".[584] Conversely, Renata Szafarz believes that "one may conclude from the amendments tabled at the conference and discussion that: (a) the above description [in article 2, paragraph 1 (d) of the 1969 Vienna Convention] does not exclude the possibility of its application also to bilateral treaties ...".[585] Richard Edwards is more circumspect: basing himself on practice and on the ambiguity of the *travaux*

[582] United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1970, Second session, 10th plenary meeting, 29 April 1969, para. 23, p. 28.

[583] Ibid., 11th plenary meeting, 30 April 1969, p. 37.

[584] J. M. Ruda, "Reservations to treaties", *Receuil des cours ... 1975-III*, vol. 146, p. 110.

[585] Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, 1970, p. 294.

préparatoires, he maintains that the latter "actually leave ... the matter ambiguous given the statement of the President of the Vienna Conference. Further examination of the *travaux* does not resolve the matter but instead suggests that action was taken at the Conference, without strenuous objection, but with differing views on whether there would be any impact on bilateral treaties".[586] This was, in fact, the relatively inconclusive conclusion to be drawn from the *travaux préparatoires*.

(ii) The 1986 Convention on treaties concluded by international organizations

440. The question was hardly discussed during the preparation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Right at the outset the Special Rapporteur, Paul Reuter, said "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice."[587]

441. Moreover, while the Commission had initially considered devoting specific provisions to reservations made to treaties concluded between several international organizations, it was thought that "the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily".[588] On that occasion the Commission noted:

> "This remark carried so much weight that it was argued that the system of reservations established by article 19 should be extended to the case of treaties between two international organizations. That raised the question whether the mechanism of reservations can operate generally in the case of bilateral treaties. Although the text of the Vienna Convention does not formally preclude this possibility,[589] the Commission's commentaries of 1966 leave no doubt that it regarded reservations to bilateral treaties as going beyond the technical mechanism of reservations and leading to a proposal to reopen negotiations.[590] The Commission did not wish to start a debate on this question, although most of its members considered that the regime of reservations could not be extended to bilateral treaties without distorting the notion of a 'reservation'. Considered as a whole, however, the texts of draft articles 19 and 19 *bis* in fact relate to multilateral treaties."[591]

---

[586] Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, p. 404.

[587] Fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 36; see also *Yearbook ... 1975*, vol. I, 1348th meeting, 10 July 1975, para. 40, p. 238; and *Yearbook ... 1981*, vol. I, 1648th meeting, 11 May 1981, para. 28, p. 29. Paul Reuter took the same position in his book *Introduction au droit des traités* (3rd ed., revised and expanded by Philippe Cahier, Paris, P.U.F., 1995, p. 72) "*... bien que techniquement possible pour un traité bilatéral, la 'réserve' ne constitue pas dans le cadre de ce dernier une figure juridique pratique, ni originale, car elle se ramène à rouvrir après leur clôture les négociations*" ("... while technically possible in the case of bilateral treaties, 'reservations' are neither a pratical nor an original legal construct in this context, for they lead to a reopening of negotiations after the negotiations have ended").

[588] Report of the International Law Commission to the General Assembly on its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary on draft article 19, p. 106.

[589] The commentary refers the reader to the statement by the Chairman of the Drafting Committee of the Vienna Conference, cited in note 583 above.

[590] The commentary refers the reader to the commentary made in 1966, cited in note 575 above.

[591] Report of the Commission to the General Assembly on the work of its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary on draft article 19, p. 106; the discussion referred to in the commentary took place at the 1649th, 1650th and 1651st meetings (held on 12 and 13 May 1981) (*Yearbook ... 1981*, vol. I; see in particular the statements by Mr. Ushakov, p. 38, Mr. Reuter, pp. 40 and 44, Sir Francis Vallat, p. 42, Mr. Riphagen, Mr. Calle y Calle, Mr. Tabibi and Mr. Njenga, pp. 42-43).

442. Ultimately, these articles were not retained in the final draft adopted by the Commission, which went back to the system used in the 1969 Convention.[592] It was this text which, with slight modification, was adopted by the Vienna Conference in 1986,[593] and the question of reservations to bilateral treaties was apparently not taken up again.

443. The Commission thus reverted to the 1969 text (with the necessary additions to deal with the topic under consideration) and to the ambiguities which persist in that text.

(iii) The 1978 Convention on succession of States in respect of treaties

444. It appears that the question of reservations to bilateral treaties in the case of a succession of States was not raised during the discussion in the Commission or at the Vienna Conference of 1978. However, the 1978 Vienna Convention on Succession of States in respect of Treaties tends to confirm the general impression gathered from a review of the 1969 and 1986 Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties.[594] Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of part III,[595] which deals with multilateral treaties,[596] and expressly stipulates that it is applicable "when a newly independent State establishes its status as a party or as a contracting State to a *multilateral* treaty by a notification of succession".

445. Here again, however, the only conclusion one can draw is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of "reservations" to bilateral treaties is inconceivable or non-existent.

(b) The practice of States with regard to reservations to bilateral treaties

446. If, as the responses to the questionnaire on reservations to treaties indicate, international organizations do not appear to attach "reservations" to their signature or act of formal confirmation of bilateral treaties to which they are parties,[597] this is not the case with States, some of which do not hesitate to make unilateral statements which they call "reservations" in respect of bilateral treaties, while others claim to be opposed to them.

447. A review of State practice in the area of reservations to bilateral treaties is hardly more conclusive than a review of the provisions of the Vienna Conventions in the light of their *travaux préparatoires*: such practice exists, but it is unclear whether it can be interpreted

---

see also the statement by the Chairman of the Drafting Committee, Mr. Díaz González, of 16 July 1981 (1692nd meeting), *Yearbook ... 1981*, vol. I, pp. 262-263, and the Report of the Commission to the General Assembly on the work of its thirty-third session, *Yearbook ... 1981*, vol. II, Part Two, pp. 137-138, and the Report of the Commission on the work of its thirty-fourth session, *Yearbook ... 1982*, vol. II, Part Two, p. 34: "it was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter".

[592] Ibid.

[593] See the first report on the law and practice concerning reservations to treaties, A/CN.4/470, paras. 87-88, pp. 40-41.

[594] See on this subject the observations of Mr. Mikulka during the debate on the Special Rapporteur's first report (18 July 1995, A/CN.4/SR.2406, p. 19).

[595] Which concerns only "newly independent States".

[596] Section 3 deals with bilateral treaties.

[597] The Food and Agriculture Organization of the United Nations (FAO), however, notes that: "When presented with or presenting a 'standard' agreement, amendments are sought and made as needed, rather than making reservations."

as confirming the existence of reservations to bilateral treaties as a specific institution. This is a practice which has been in existence for a long time and is geographically circumscribed.

448. The oldest example of a "reservation" to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the Jay Treaty of 19 November 1794, "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified".[598] The Senate consequently asked the President to renegotiate the Treaty with the British Government, which accepted the amendment – a word which was actually in use at the time and which remained so for many years.[599]

449. The search for the partner State's consent is, moreover, a constant in United States practice in this area. As the Department of State noted in its instructions to the American Ambassador in Madrid following Spain's refusal to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted, "[t]he action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign Government with a view to obtaining its acceptance of the advised amendment."[600] Such consent is usually given, but this is not always the case.

450. For example, Napoleon accepted a modification made by the Senate to the Treaty of Peace and Amity of 1800 between the United States and France, but then attached his own condition to it, which the Senate accepted.[601] An even more complicated case concerns ratification of the Convention of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature.[602]

451. In other cases, the partner of the United States has refused the amendment requested by the Senate, and the treaty has not entered into force. For example, the United Kingdom rejected amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States Senate had requested.[603] Another famous rejection of the United States Senate's demands, again by the British Government, involves the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 18 November 1901.[604]

---

[598] Quoted by William W. Bishop, Jr., *Recueil des cours de l'Académie de droit international*, 1961-II, vol. 103, pp. 260-261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (ibid., note 13).

[599] Ibid. Concerning the terminology used in United States domestic practice, see also note 652 below.

[600] Quoted by Green Haywood Hackworth, *Digest of International Law*, vol. V (Washington, D.C., United States Printing Office, 1943), p. 115.

[601] Marjorie Owen, "Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, pp. 1090-1091; or William W. Bishop, Jr., op. cit., pp. 267-268.

[602] Ibid., p. 269.

[603] Ibid., p. 266.

[604] Green Haywood Hackworth, op. cit., pp. 113-114.

452. Despite these "failures", the practice of reservations by the United States of America to bilateral treaties is firmly established, and the United States often subordinates its ratification of a bilateral treaty to acceptance by the other party of the changes sought by the Senate.[605]

453. In 1929, Marjorie Owen estimated that somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification.[606] More recently, Kevin Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries.[607] The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("FCN treaties"), and even peace treaties.[608]

454. In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985.[609] Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal[610] of 7 September 1977,[611] the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice, and the Supplementary Extradition Treaty with the United Kingdom of 25 June 1985.[612]

455. It is striking to note, however, that only the United States gave an affirmative answer to question 1.4 of the questionnaire.[613] All other States that answered this question did so in the negative.[614] Some of them simply said that they do not formulate reservations to bilateral treaties, but others went on to provide some interesting details.

456. Spain, for example, said:

> *"España no ha formulado ninguna reserva a tratados bilaterales, al no estar contemplada esta prática en Derecho español."* ("Spain has not formulated any

[605] See the many examples cited by Green Haywood Hackworth, op. cit., pp. 112-130; Kevin C. Kennedy, "Conditional approval of treaties by the United States Senate", *Loyola of Los Angeles International and Comparative Law Journal*, October 1966, pp. 100-122; or Marjorie M. Whiteman, *Digest of International Law*, vol. 14, pp. 159-164.

[606] Marjorie Owen, op. cit., p. 1091.

[607] Kevin C. Kennedy, op. cit., p. 98.

[608] Ibid., pp. 99-103 and 112-116.

[609] The Special Rapporteur is not sure whether this means that the United States has not formulated any reservations to a bilateral treaty since 1985. Professor Kennedy, who seems to have made a complete inventory in studying this practice (ibid.), offers no examples later than that date.

[610] The Senate resolution of 16 March 1976 stipulates that ratification of the second treaty is subject to two "amendments", two "conditions", four "reservations" and five "understandings".

[611] Concerning the ratification of these two treaties, see in particular Georges Fischer, "*Le canal de Panama. Passé, présent, a venir*", *Annuaire français de droit international*, 1977, pp. 745-790; or Richard W. Edwards, Jr., op. cit., pp. 378-381.

[612] The Senate resolution of 17 July 1986 requesting these changes called them "amendments".

[613] The question read: "Has the State formulated reservations to bilateral treaties?"

[614] The following States answered in the negative: Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, the Holy See, India, Israel, Italy, Japan, the Republic of Korea, Kuwait, Mexico, Monaco, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

reservations to bilateral treaties, as no provision is made in Spanish law for this practice.")

This would seem to imply that Spain does not rule out this possibility in international law.

457. Germany proved to be more sceptical on this point, saying:

> "The Federal Republic of Germany has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations."

The replies from Italy and the United Kingdom were very similar.

458. However, the United Kingdom added:

> "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties."

459. The fact remains that the response to the questionnaire was far from universal, and examples of "reservations" to bilateral treaties from States other than the United States of American can in fact be found. These include, first of all, the counter-proposals made by some States in response to the reservations of the United States; early examples have been cited above,[615] and there are others. Japan, for example, did not agree to ratification of the Treaty of Friendship, Commerce and Navigation of 2 April 1953 with the United States except by means of a "reciprocal" reservation.[616] Sometimes the initiative seems to have been taken first by the partner country of the United States. Marjorie Owen cites the example of an 1857 treaty with New Granada [Colombia], which proposed "modifications" that were accepted by the United States.[617] Similarly, Portugal, Costa Rica and Romania expressed their desire that extradition treaties concluded with the United States in 1908, 1922 and 1924 respectively should not be applicable if the person to be extradited would be subject to the death penalty in the United States; the United States accepted this condition.[618] In 1926 El Salvador ratified a commercial treaty with the United States subject to a number of reservations, most of which were withdrawn at the request of the latter; it nevertheless accepted two of them, which it considered minor. These are reflected in a protocol issued in connection with the exchange of ratifications, although they are described there as "understandings".[619]

460. It is interesting to note that this practice, even when not employed by the United States, is limited to relations with that country. Yet it is difficult to draw any firm conclusions from this observation. For one thing, the fact that the Special Rapporteur is unable to provide any examples other than the ones relating to the United States may be explained by the exceptional wealth of documentation pertaining to that country, whereas the practice may exist elsewhere and its existence go unknown for want of readily accessible publications or commentary. Conversely, it is quite striking that the constitutional justifications for this

[615] Para. 450.

[616] See Marjorie M. Whiteman, op. cit., p. 161.

[617] Marjorie Owen, op. cit., p. 1093.

[618] Green Haywood Hackworth, op. cit., pp. 126-127 and 129-130.

[619] Ibid., pp. 127-128, or William W. Bishop, Jr., op. cit., p. 269. For another example concerning a "reservation" rejected by the United States, see para. 464 below.

practice cited by the United States can be found elsewhere, and yet they have not led other States in similar constitutional situations to formulate reservations to their bilateral treaties.

461. In the United States, the Senate's power to make the President's ratification of both multilateral and bilateral treaties subject to certain reservations is generally deduced from article II, section 2, of the Constitution, which stipulates: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ..."[620] In truth, however, all democratic countries, whether theirs is a parliamentary, presidential or assembly form of government, appear to find themselves in this situation, and yet this does not lead them to formulate reservations to the bilateral treaties they conclude.

462. Pierre-Henri Imbert does not share this point of view, believing that a distinction should be made between parliamentary and presidential forms of government. In presidential regimes, he maintains, "*comme par exemple [aux] États-Unis, le rôle des Assemblées élues est évidemment beaucoup plus important. Le Sénat américain, en effet, n'est pas seulement une assemblée législative. Il est aussi un collaborateur indispensable. Lorsqu'il examine un traité, il est tenté d'agir en conseil du gouvernement: la possibilité d'amender lui semble tout naturel*" ("as, for example, in the United States, the role of elected assemblies is obviously much more important. Indeed, the United States Senate is not only a legislative assembly. It is also an indispensable collaborator. When it reviews a treaty, it tends to act as an adviser to the Government: it considers the prospect of amending the treaty to be entirely natural").[621] This may explain the respective "state of mind" of parliamentary and executive authorities in each case, but in strictly legal terms, nothing prevents a parliament whose authorization is a requirement for ratification from conditioning such ratification by formulating a reservation.

463. The three most recent constitutions of the French Republic have made ratification of many categories of treaty by the President of the Republic subject to parliamentary authorization:[622] thus France finds itself, *mutatis mutandis*, in the same situation as the United States of America, and while France may formulate reservations to multilateral treaties at the request of Parliament[623] it appears never to have done so in the case of bilateral treaties.

464. Nevertheless, the case of France reveals at least one instance in which a parliament has sought to make legislative authority to ratify subject to the formulation of a reservation. During the debate on the Washington Agreement of 29 April 1929 for the reimbursement of French debts to the United States (once again, the same country), the Finance Committee of the Chambre des députés proposed a text incorporating reservations into the authorization act (which would have compelled the President of the Republic to formulate them upon depositing the instrument of ratification). This project was abandoned at the request of the

[620] See, for example, Louis Henkin, "The treaty makers and the law makers: the Niagara reservation", *Columbia Law Review*, 1956, p. 1176; William W. Bishop, Jr., op. cit., pp. 268-269, or Marjorie M. Whiteman, op. cit., p. 138.

[621] Pierre-Henri Imbert, *Les réserves aux traité multilatéraux* (Paris, Pédone, 1979), p. 395.

[622] Article 8 of the Constitutional Act of 16 July 1875, article 27 of the 1946 Constitution and article 53 of the 1958 Constitution; for commentary on this provision, see Alain Pellet in Gérard Conac and François Luchaire, dirs., *La Constitution de la République française* (Paris, Economica, 1987), pp. 1005-1058, notes pp. 1039-1042 and 1047-1051.

[623] See the examples given by Alain Pellet, ibid., pp. 1041 and 1048, or Pierre-Henri Imbert, op. cit., pp. 394-395; in the latter case, the examples also cover Belgian and Italian practice. Imbert notes that in a parliamentary regime, assemblies "may authorize ratification by proposing reservations. However, this option is not exercised frequently, either because of practical difficulties (such as, for example, the need to reopen negotiations), or simply because it is regarded with much suspicion" (p. 394).

Minister for Foreign Affairs and the Minister of Finance for reasons of expediency[624] although not for legal reasons. It should also be noted that, given Parliament's hesitation in this case, the executive power took the initiative of requesting the inclusion of a safeguard clause making the repayment subject to payment of reparations by Germany. This was what the United States would have called a "reservation" in its own practice, and it refused to accept it.[625]

465. From this review, admittedly incomplete, one may draw the following conclusions:

(a) With the exception of the United States of America, States seldom formulate reservations to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States);

(b) This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States of America, having on occasion rejected reservations proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own "counter-reservations" of a similar nature;

(c) The legal nature of "reservations" to bilateral treaties.

466. One must nevertheless question whether these "reservations" are true ones – in other words, whether they correspond to the Vienna definition.[626] Once again, it is easiest to hold the different elements of that definition up to the practice of reservations to bilateral treaties. It will then be seen that, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

467. From practice, as described above, it appears that reservations to bilateral treaties are formulated unilaterally by States (and, a priori, nothing prevents an international organization from doing the same) once the negotiations have ended, and they bear different names that may reflect real differences in domestic law, but not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or [by a State] when making a notification of succession to a treaty ..."

(i) The moment when "reservations" to bilateral treaties are formulated

468. Admittedly, this definition cannot be used as it stands: reservations to bilateral treaties are consistent with this first part of the Vienna definition, but some of the details contained in that definition have no logical application to them. This is particularly evident as regards the moment when a reservation to a bilateral treaty may be made.

469. In the first place, it is inconceivable that a reservation to a bilateral treaty would be formulated at the time of signature. Of course, it may happen that the negotiator only places his signature at the bottom of the treaty "subject to" subsequent confirmation, and he may on that occasion indicate the points on which the State he represents has concerns.

[624] Regarding this episode, see Alexandre-Charles Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, Editions du CNRS, 1962), vol. I, pp. 284-285.

[625] Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Pedone, 1970), pp. 122-123.

[626] See para. 82 above.

Technically speaking, however, this does not correspond to a reservation but to an institution apart from the law of treaties: that of signature *ad referendum*, by which the signatory accepts the text of a treaty only on condition that his signature be confirmed by the appropriate authority; if this is done, the treaty is considered to have been signed from the outset;[627] if it is not done, the treaty becomes void or is renegotiated.

470. Secondly, it goes without saying that it is impossible to accede to a bilateral treaty. Although the Vienna Conventions do not define it[628] accession may be considered to be the act by which a State or an international organization that has not participated in the negotiation of the treaty, or in any case signed its text, expresses its final consent to be bound. This is only conceivable in the case of multilateral treaties; bilateral treaties cannot be negotiated and signed by a single State!

471. Thirdly, and lastly, article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties does not contemplate the possibility of a newly independent State formulating a reservation when notifying a succession except in the case of multilateral treaties; however part III, section 3 of that Convention makes no such provision in the case of bilateral treaties.[629] This is normal, since the principle here is one of rupture: the treaty remains in force only if the two States expressly or implicitly so agree.[630] Thus it is highly questionable whether a newly independent State can formulate a "reservation" to a bilateral treaty on such an occasion: the unilateral statement that it might make to exclude or modify the legal effect of certain provisions of the treaty would have an effect only if the other party accepted it – in other words, if the treaty was ultimately amended.

472. This last observation, however, does not apply to any "reservations" that a predecessor State may formulate upon notification of its succession. This is the fundamental character of all "reservations" to bilateral treaties, regardless of when they are formulated, and which distinguishes them from reservations to multilateral treaties as they are defined by the three Vienna Conventions.

(ii) "Reservations" to bilateral treaties do not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author

473. The definition of reservations set out in the Vienna Conventions was carefully weighed; each word is significant and, notwithstanding the criticisms that have been levelled at it, it appropriately describes the phenomenon of reservations, even if it leaves some uncertainties which the Guide to Practice seeks to dispel.

474. One of the fundamental elements of this definition is the teleological element, the objective pursued by the State or international organization making the reservation. By its unilateral statement, the author "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization". This wording is not entirely applicable to reservations to bilateral treaties, or at least if it is, it is misleading, for it overlooks one of their principle characteristics.

475. There is no doubt that with a "reservation", one of the contracting parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. But while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a "reservation" to a bilateral treaty seeks to modify it: if the reservation produces

[627] See article 12, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions.

[628] The "definition" set out in article 2, paragraph 1 (b), of the 1969 Convention and article 2, paragraph 1 (b) *ter*, of the 1986 Convention is entirely tautological and useless.

[629] See para. 444 above.

[630] See articles 24 and 28.

the effects sought by its author, it is not the "legal effect" of the provisions in question that will be modified or excluded "*in their application*" to the author; it is the provisions themselves that will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified vis-à-vis the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

476. It is important to state this clearly: a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international organizations.[631] The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

(a) In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force,[632] even, at times, between the objecting State or international organization and the author of the reservation,[633] and its provisions remain intact;

(b) In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(iii) "Reservations" to bilateral treaties are proposals to amend

477. "Reservations" to bilateral treaties, then, do not produce an effect if they are not accepted, and it is hardly conceivable that this fundamental point should not be mentioned in their definition: while a reservation to a multilateral treaty paralyses, to the extent indicated by its author, the treaty's legal effect, a reservation to a bilateral treaty is, in reality, nothing more than a proposal to amend the treaty or an offer to renegotiate it.

478. This analysis corresponds to the prevailing views in doctrine.

479. Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable. According to Charles Rousseau,

> "*[p]our les traités bilatéraux ... on se trouve en présence d'une véritable convention synallagmatique mettant à la charge des parties contractantes des obligations précises et dans laquelle la prestation de l'un des signataires forme la contrepartie naturelle de la prestation de l'autre co-contractant. Dès lors une ratification assortie de réserves est inconcevable, car elle ne peut s'interpréter ... que comme un refus de ratifier accompagné d'une nouvelle offre de négocier. Elle n'a de valeur que si l'autre co-contractant y donne son acceptation expresse ...*"("bilateral treaties ... are true synallagmatic conventions which impose specific obligations on the contracting parties and in which the signing by one of the parties is the natural complement to the signing

[631] Article 20 of the 1969 and 1986 Conventions states that a reservation can have been accepted in advance by all the signatory States and be expressly authorized by the treaty (para. 1), or it can be expressly accepted (paras. 2, 3 and 4), or it can be "considered to have been accepted" if no objection is raised within 12 months (para. 5).

[632] Subject to the separate question of determining whether an objection can have an effect on the number of States required for entry into force of the treaty; this problem will be considered in the report on the effects of reservations.

[633] See article 20, para. 4 (b), of the 1969 and 1986 Conventions.

by the other co-contractor.[634] Consequently, a ratification with reservations attached is inconceivable, since it can only be interpreted ... as a refusal to ratify accompanied by a new offer to negotiate. It has no value unless the other co-contractor expressly accepts it ...").[635]

480. The need for acceptance of any "reservation" to a bilateral treaty is virtually unanimously endorsed in doctrine and consistent with the teachings of practice. Marjorie Owen, after citing a great many examples of such reservations and the results thereof, concluded in 1929: "From these examples, it seems reasonably clear that neither party has doubted the right of the other to introduce reservations at the time of ratification: the only restriction upon this liberty is that the other signatory shall consent to such reservations".[636]

481. This is also consistent with the position taken back in 1919 by Hunter Miller, long an officer with the United States Department of State and Legal Adviser to the United States delegation to the 1919 Paris Conference: "One conclusion supported by *all* of the foregoing precedents is that the declaration, whether in the nature of an explanation, an understanding, an interpretation, or reservation of any kind, *must be agreed to by the other Party to the treaty*. In default of such acceptance, the treaty fails ... Accordingly, in a treaty between two Powers only, the difference between a reservation of any nature and an amendment, is purely one of form. In an agreement between two Powers there can be only *one* contract. The whole contract is to be sought in all the papers, and whether an explanation or interpretation or any other kind of a declaration relating to the terms of the treaty is found in the treaty as signed or in the instruments of ratification is wholly immaterial. There are only two contracting Parties and each has contracted only with the other and has accepted an identic instrument of ratification from the other, which together with the signed treaty constitute one agreement."[637]

482. This is also the view of Bishop (who quotes Miller):[638] "Bilateral treaties invited the analogy of ordinary bilateral contract doctrines of offer and acceptance, with a reservation being treated as a counter-offer which must be accepted by the other party if it were to be any contract between the parties".[639]

483. This idea of a "counter-offer"[640] does in fact highlight the contractual nature of the phenomenon of reservations to bilateral treaties: whereas reservations to multilateral treaties do not lend themselves to a contractual approach,[641] reservations to bilateral treaties demand

---

[634] Georges Scelle concedes that a bilateral treaty may have the character of a "treaty-law", which leads him to acknowledge the possibility of reservations to such treaties, although he excludes them in the case of "treaty-contracts" (*Précis de droit des gens (principes et systématiques)*, vol. II (Paris, Sirey, 1934, reissued in 1984 by CNRS), p. 474).

[635] Charles Rousseau, op. cit., p. 122; similarly, Alfredo Maresca, *Il diritto dei tratatti - La Convenzione codificatrice di Vienna del 23 Maggio 1969* (Milan, Giuffrè, 1971), pp. 281-282.

[636] Marjorie Owen, op. cit., pp. 1093-1094.

[637] David Hunter Miller, *Reservations to Treaties: The Effect and the Procedure in Regard Thereto* (Washington, D.C., 1919), pp. 76-77.

[638] William W. Bishop, Jr., op. cit. p. 271, note 14.

[639] Ibid., p. 267; see also p. 269.

[640] Marjorie Owen (op. cit., p. 1091) traces this idea of a "counter-offer" back to Hyde, *International Law*, 1922, para. 519. The expression also appears in the American Law Institute's *Restatement of the Law Third - The Foreign Relations Law of the United States*, vol. 1 (Washington, D.C., 14 May 1986), para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, para. 437 above, and that of Paul Reuter, note 509 above.

[641] See paras. 123-129 above.

such an approach. The "reservation" only has meaning, only produces an effect, only exists if the "counter-proposal" which it constitutes is accepted by the other State.[642]

484. Thus, as is clear from practice, a "reservation" to a bilateral treaty is actually a request to renegotiate the treaty.[643] If this request is refused, either the State that made the proposal abandons it and the treaty enters into force as signed, or else the treaty itself is simply abandoned. If, on the other hand, the other State agrees to the request, it can do so quite simply – and the treaty enters into force with the modification desired by the State that formulated the proposal – or it can in turn put forward a "counter-counter-proposal",[644] and the final text will be the one produced by the new negotiations between the two States.

485. There has been some question as to whether acceptance of the new offer constituted by the "reservation" must be express or may be tacit.[645] In practice, it seems that it is always express;[646] the United States in particular includes both its own reservations and their acceptance by the other State in its instruments of ratification.[647] This is also consistent with a theoretical requirement: acceptance of a "reservation" to a bilateral treaty ultimately leads in reality to amendment of the treaty; otherwise a State cannot be presumed to be bound by it.

486. Here, too, the problem is stated differently for reservations to multilateral treaties, which do not entail modification of the treaty; the treaty's application is simply "neutralized" in the relations between the author of the reservation and the party or parties that accept it. In the case of "reservations" to a bilateral treaty, the treaty itself is modified to the advantage of the author of the reservation and to the detriment of the other party. Here one does not go back to general international law or to international law "minus the treaty";[648] rather, new *treaty* obligations[649] are created. A treaty cannot be concluded implicitly, which means that the rules set out in paragraphs 2 and 5 of article 20 of the 1969 and 1986 Vienna Conventions cannot and must not be extended to bilateral treaties.

487. In fact, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force, while the amendment itself is conventional in nature, is the result of an agreement between the parties[650] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

---

[642] In support of this contractual analysis, apart from William W. Bishop, Jr. (see note 640 above), see in particular Louis Henkin, op. cit., pp. 1164-1169, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. V, 1988, p. 23.

[643] This is in fact apparent from the Commission's commentary, cited in para. 431 above. See also note 561 above and the replies of Germany, Italy and the United Kingdom to the questionnaire on reservations to treaties, cited in paras. 457 and 458 above. See also Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th Edition, vol. I, *Peace* (London, Longman), p. 1242, or Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), p. 54.

[644] See para. 450 above.

[645] See Frank Horn, op. cit., pp. 4 and 126.

[646] See Marjorie M. Whiteman, op. cit., p. 138.

[647] See, however, the somewhat strange case cited by Marjorie Owen (op. cit., p. 1093) of the German-American Treaty on Commerce of 19 March 1925, to which the United States Senate made "reservations" that were accepted by Germany "notwithstanding serious fundamental objections".

[648] See para. 224 above.

[649] See the draft article proposed by Sir Humphrey Waldock in 1962, note 569 above.

[650] See article 39 of the 1969 and 1986 Conventions.

488. At the international level, the distinction between "reservations" and "amendments" in the domestic practice of the United States is devoid of meaning: regardless of the term used or of the fact that Congress imposes conditions under different names, they are always just offers to amend the treaty.

489. According to Richard Edwards,"[r]eservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party".[651] While this may be the case domestically, it is certainly not the case at the international level: in both cases, the Senate makes its consent to modify the treaty conditional. The same holds true for all conditions it places thereon, with the exception of interpretative declarations, which raise problems that differ in some aspects.[652]

490. As the Solicitor for the Department of State noted in a memorandum dated 18 April 1921,

> "The action of the Senate when it undertakes to make so-called 'reservations' to a treaty is evidently the same in effect as when it makes so-called 'amendments', whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times."[653]

491. Thus, while this is not a conclusive argument, it is interesting to note that neither the American members of the International Law Commission during the preparation of the Commission's draft articles on the law of treaties, nor the United States delegates to the Vienna Conferences which adopted the 1969, 1978 and 1986 Conventions stressed, or apparently even mentioned, "reservations" to bilateral treaties during the debate on reservations. This would seem to reflect their awareness that this institution, the permissibility of which under international law can hardly be contested,[654] was based on a different logic and could not be assimilated to what are called "reservations" in international law. These texts are in fact "conditional ratifications"; they also exist in respect of multilateral treaties,[655] which are governed by a legal regime that is very different from the regime of reservations in the sense of the Vienna Conventions on the law of treaties.

492. This, then, is the conclusion which the Special Rapporteur proposes that the Commission draw from the foregoing analysis:

---

[651] Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, p. 380.

[652] See section 3 below. Kevin C. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral), but notes that four of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	*1845–1895*	*1896–1945*	*1946–1990*
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

(Kevin C. Kennedy, op. cit., p. 100).

[653] Quoted by Green Haywood Hackworth, op. cit., p. 112; along the same lines, see the position of David Hunter Miller, para. 481 above.

[654] See para. 465 above.

[655] See para. 168 above.

(a) It may happen that a State or an international organization formulates, after signing a bilateral treaty but prior to the treaty's entry into force, a unilateral statement by which it purports to obtain from the other contracting party a modification of the provisions of the treaty, to which it subordinates the expression of its consent to be bound;

(b) Whatever it is called, and even if it is called a "reservation", such a statement does not constitute a reservation in the sense of the Vienna Conventions or, more broadly, the law of treaties; it is thus not subject to the legal regime applicable to reservations to treaties;

(c) The statement constitutes an offer to renegotiate the treaty and, if this offer is accepted by the other party, it becomes an amendment to the treaty, whose new text is binding on both parties once they have expressed their final consent to be bound in accordance with the modalities stipulated in the law of treaties.

493. In this spirit, the Commission might wish to adopt the following draft guideline:

Guide to practice:

"*1.1.9 A unilateral statement formulated by a State or by an international organization after signing a bilateral treaty but prior to its entry into force, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it subordinates the expression of its final consent to be bound by the treaty, does not constitute a reservation, however phrased or named.*

"*The express acceptance of the contents of this statement by the other party results in an amendment to the treaty whose new text is binding on both parties once they have expressed their final consent to be bound.*"

2. Interpretative declarations made in respect of bilateral treaties

494. The silence of the Vienna Conventions on the law of treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general[656] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.[657]

495. In fact, such interpretative declarations do not pose any real problems vis-à-vis those made in respect of multilateral treaties, although it seems that they are invariably conditional.[658] This is the only outstanding feature that can be observed from a review of relatively extensive practice.

(a) The practice of interpretative declarations made in respect of bilateral treaties

496. Apparently more recent than the practice of reservations to bilateral treaties, the practice of interpretative declarations to such treaties is less geographically limited and does not seem to give rise to objections where principles are concerned.

497. The oldest example cited by Kevin Kennedy, author of an exhaustive survey of conditional approvals of treaties (in general) by the United States Senate, dates back to the "understandings" which the United States set as a condition for its acceptance of the Treaty of Peace, Amity, Commerce and Navigation with Korea in 1883.[659] Earlier examples can

---

[656] See paras. 349-356 above.

[657] See note 564 above.

[658] See paras. 314-355 above and draft guideline 1.2.4.

[659] Kevin C. Kennedy, op. cit., p. 118.

be found: William Bishop notes a declaration attached by Spain to its instrument of ratification of the Treaty of 22 February 1819 ceding Florida,[660] and Charles Rousseau mentions "the approval [*sic*] by the [French] Parliament of the Franco-Tunisian Convention of 8 June 1878, voted with an interpretative reservation to article 2, paragraph 3, concerning the regulation of loans issued by Tunisia".[661]

498. The situation at present, as reflected in the replies to the questionnaires on reservations, is as follows:

(a) Of 22 States that answered question 3.3,[662] four said that they had formulated interpretative declarations in respect of bilateral treaties;

(b) One international organization, the International Labour Organization (ILO), wrote that it had done so in one situation, while noting that the statement was in reality a "corrigendum", "made in order not to delay signature".[663]

499. These results may seem "meagre"; they are significant nevertheless:

(a) While only the United States claimed to make "reservations" to bilateral treaties,[664] it is joined here by Panama, Slovakia and the United Kingdom[665] and by one international organization;[666]

(b) While several States criticized the very principle of "reservations" to bilateral treaties,[667] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties;

(c) Furthermore, the replies to the questionnaires, interesting though they might be, provide an incomplete picture of the situation: many States and international organizations, unfortunately, have not yet replied, and the information requested relates only to the past 20 years.

500. It thus appears that the practice of interpretative declarations to bilateral treaties is well established and fairly general. Here again, the United States of America is one of the

[660] William W. Bishop, Jr., *op. cit.*, p. 316.

[661] Charles Rousseau, *op. cit.*, p. 120.

[662] "Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?"

[663] See the letter of the Director-General of ILO to the Minister of Public Service, Labour and Social Welfare of Zimbabwe which accompanied signature of the Agreement of 8 February 1990 concerning the subregional office in Harare: "This letter is to confirm the following understandings of the International Labour Organization: that 'employed in the service of the Harare Office' [in article 4, paragraph (e), of the Agreement] is understood within the meaning of Article 4, paragraph 1, and that 'the right to transfer out of the Republic of Zimbabwe, without any restriction or limitation, provided that the official concerned can show good cause for their lawful possession of such funds' means 'the right to transfer the same out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for the lawful possession thereof.' The Office further understands the word 'telephone' in Article 9, paragraph 1, of the Agreement, to mean 'telecommunications'" (*Official Bulletin*, 1994, Series A, No. 3, p. 254).

[664] See para. 455 above.

[665] However, the example cited by the United Kingdom concerns its own interpretation of the understandings in the United States instrument of ratification of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters, see paras. 500 and 505 below.

[666] In addition, Sweden said: "It may have happened, although very rarely, that Sweden has made interpretative declarations, properly speaking, with regard to bilateral treaties. [...] Declarations of a purely informative nature of course exist."

[667] See paras. 457-458 above.

"main sources" of the practice.[668] In just the period covered by that country's response to the questionnaire (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound. These include:

(a) The two aforementioned treaties of 7 September 1977 concerning the Panama Canal,[669] which, at the request of the United States Senate, were both made subject to "reservations" (called "amendments", "conditions" and "reservations") and interpretations ("understandings") that were included in the instruments of ratification together with an interpretative declaration by Panama;[670]

(b) The Agreement of 18 November 1977 on the implementation of International Atomic Energy Agency (IAEA) safeguards, which constitutes a bilateral treaty between a State and an international organization;

(c) The Conventions with the Federal Republic of Germany of 3 December 1980 and 29 August 1989, on fiscal matters, which gave rise, in the case of the former, to a "memorandum of understanding" followed by a request for explanations by Germany regarding the scope of the understanding to which the Senate had subordinated its consent and, in the case of the second, an exchange of interpretative notes, apparently originated by Germany;

(d) The Treaty on mutual legal assistance in criminal matters with Canada of 18 March 1985, to which the United States attached an interpretative declaration; Canada stated that it considered that the declaration "does not in any way alter the obligations of the United States under this Treaty";[671]

(e) The Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters of 3 July 1986;[672]

(f) The Convention of 8 October 1993 with Slovakia, on avoidance of double taxation and prevention of tax evasion, which was also the subject of an "understanding" on the part of the Senate. Slovakia noted that the understanding "was prompted by an inadvertent error in the drafting of the English-language text of the treaty and has the effect of correcting the English-language text to bring it into conformity with the Slovak-language text".

501. The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leaves little doubt as to how this institution is viewed in international law: it is clearly a "general practice accepted as law".

502. United States practice alone is particularly extensive and clear, and goes well beyond the period covered by the country's reply to the questionnaires on reservations;[673] moreover,

---

[668] See, however, the observation in para. 460 above concerning reservations to bilateral treaties, which is applicable to interpretative declarations.

[669] See para. 455 above.

[670] In its reply to the questionnaire, Panama did not mention that example, but the Protocol of the exchange of instruments of ratification states: "It is also the understanding of the Republic of Panama ...", see also para. 502 below.

[671] Similarly, see the reaction of Thailand to the United States "understandings" concerning the Treaty on mutual assistance in criminal matters and the reaction of Mexico to the statement by the United States concerning the Treaty on cooperation for mutual legal assistance of 9 December 1987.

[672] See the reaction of the United Kingdom to the interpretative declaration made by the United States of America, para. 505 below.

[673] See in particular the many examples cited *ibid.*, pp. 116-124, or by Marjorie M. Whiteman, *op. cit.*, pp. 164-170.

far from diminishing, as seems to be the case with "reservations",[674] this practice appears to be becoming entrenched and growing stronger.[675] Secondly, and without prejudice to the ambiguous position of the United Kingdom quoted below,[676] the partners of the United States have occasionally contested that country's interpretations, but not its right to formulate them. Thirdly, these States have occasionally made their own interpretative declarations, concerning the very provisions interpreted by the United States and others as well (as, for example, Panama's "reservations" to the aforementioned 1977 Panama Canal Treaty, which the United States Government considered as being "in fact understandings that did not change the United States interpretation").[677] Lastly, even though it happens less frequently, a sizeable number of States besides the United States of America have taken the initiative of attaching interpretative declarations to the expression of their consent to be bound, in treaties with the United States and with other States.

503. A list of examples, while admittedly not exhaustive, would include:

(a) Interpretative declarations made by Spain and France to treaties going back to 1819 and 1878, respectively;[678]

(b) The "explanations" which the Dominican Republic attached at the request of its Parliament to its approval of a customs convention with the United States in 1907;[679]

(c) An exchange of notes (done at signature) between the United States of America and the United Kingdom at the initiative of the latter, interpreting the 1908 Convention for arbitration between the two countries;[680]

(d) The "interpretative preamble" adopted by the German Parliament in respect of the Treaty concerning Franco-German cooperation of 22 January 1963;[681]

(e) The interpretative declarations made by the Panamanian Parliament, conditioning the country's ratification of two treaties, one concluded with Colombia in 1979 and the other with the United States of America in 1982, which are cited in Panama's reply to the questionnaire on reservations;

(f) Slovakia's interpretative declaration, likewise mentioned in its reply, which it intended to attach to its instrument of ratification of the Treaty on good-neighbourliness and friendly cooperation concluded with Hungary on 19 March 1995.

(b) Features of interpretative declarations made in respect of bilateral treaties

504. The first conclusion that can be drawn from this brief outline of State practice with regard to interpretative declarations is that it is not contested in principle.

505. The United Kingdom did, however, note, with regard to the declarations which the United States of America included with its instrument of ratification of the 1986 Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters:[682]

---

[674] See para. 454 above.

[675] See note 653 above.

[676] See para. 505 below.

[677] The American Law Institute, *Restatement of the Law Third*, vol. 1 (Washington, D.C., 14 May 1986), para. 113, p. 189.

[678] See para. 497 above.

[679] Quoted by Green Haywood Hackworth, op. cit., pp. 124-125.

[680] Ibid., pp. 151-152.

[681] Charles Rousseau, op. cit., pp. 875-878.

[682] See para. 500 above.

"With reference to the understandings included in the United States instrument of ratification, Her Majesty's Government wish formally to endorse the remarks by the leader of the British delegation at the discussions in Washington on 31 October–3 November 1989. They regard it as unacceptable for one party to seek to introduce new understandings after negotiation and signature of a bilateral treaty.

"So far as this particular case is concerned, Her Majesty's Government, while reserving entirely their rights under the treaty, note that during the debate in the Senate on 24 October 1989, an 'understanding' was described as 'an interpretive statement for the purpose of clarifying or elaborating rather than changing an obligation under the agreement'. Her Majesty's Government do not accept that unilateral 'understandings' are capable of modifying the terms of a treaty and have proceeded with ratification on the assumption that the United States will not seek to assert that the present 'understandings' modify the obligations of the United States under the treaty.

"Her Majesty's Government reserve the right to revert separately on the general issue of the attachment of understandings and reservations to bilateral and multilateral treaties."

506. Within this ambiguous statement of position one can read a condemnation of interpretative declarations made after a bilateral treaty is signed. However, the statement must also be interpreted in the light of the replies from the United Kingdom to the questionnaire on reservations, which indicate that while the country categorically rejects the possibility of making reservations to bilateral treaties,[683] it answered "yes" to the question on interpretative declarations.[684] It would therefore seem that what the Government of the United Kingdom is rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "understandings" which are really "reservations").

507. This does not pose any particular problem, but here one again encounters the general problem of distinguishing between reservations and interpretative declarations considered earlier;[685] however, the fact that a treaty is bilateral in nature in no way modifies the conclusions reached in that exercise. In particular, there is no doubt that a unilateral statement presented as an interpretative declaration must be considered to be a "reservation"[686] if it actually results in a modification of one or more provisions of the treaty.[687]

508. Speaking more broadly, whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however named or phrased, made "by a State or by an international organization, whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty

[683] See paras. 457 and 458 above.

[684] See para. 499 above.

[685] See section 1, Paragraph 3, particularly paras. 257-266 and 282-301.

[686] "Reservation" in a very specific sense, since bilateral treaties are involved, the term should really be "proposal to amend" (see paras. 477-493 above).

[687] Cf. the "understanding" in respect of the Treaty of 9 January 1909 with Panama in which the United States Senate refused to submit to arbitration questions affecting the country's vital interests when the Treaty made no provision for such an exception. The Solicitor of the State Department "expressed the view that the resolution was in effect an amendment of the treaty" (Green Haywood Hackworth, op. cit., p. 116).

or to certain of its provisions".[688] Thus, one may say that the draft guidelines concerning the definition of interpretative declarations[689] are applicable to declarations which interpret bilateral as well as multilateral treaties.

509. Since the definition is the same, the consequences are also identical. More specifically:

(a) The nature of a unilateral statement made in respect of a bilateral treaty depends not on its phrasing or name, but on its effect;[690]

(b) In the event that it is difficult to determine this nature, the same rules are applicable;[691]

(c) A general statement of policy made by a State or an international organization when signing or expressing its final consent to be bound by a bilateral treaty does not constitute an interpretative declaration;[692]

(d) Likewise, an "informative declaration", whereby the author provides the other party with indications of the manner in which it intends to implement the treaty domestically is not an interpretative declaration.[693]

510. Declarations of this type are in fact quite common, at least in the practice of the United States of America, where bilateral treaties are concerned. The many examples include:

(a) The declaration by the United States Senate regarding the commercial treaty signed with Korea on 22 May 1882;[694]

(b) The United States "understandings" with regard to the treaties on friendly relations concluded in 1921 with Austria, Germany and Hungary;[695]

(c) The famous "Niagara reservation"[696] which the United States formulated in respect of the 1950 Treaty on the Niagara River:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."[697]

511. In this last case, Canada said that it accepted "the above-mentioned reservation because its provisions relate only to the internal application of the treaty within the United States

[688] Draft guideline 1.2.

[689] In particular, draft guideline 1.2, which defines interpretative declarations.

[690] See draft guideline 1.2.2.

[691] See draft guideline 1.3.1.

[692] See draft guideline 1.2.5. The declaration adopted on 26 March 1996 by the Slovak National Council for attachment to Slovakia's instrument of ratification of the 1995 Treaty with Hungary (see para. 503 above) is partly of this nature.

[693] See draft guideline 1.2.6.

[694] William W. Bishop, Jr., op. cit., p. 312.

[695] Ibid., pp. 313-314, and Green Haywood Hackworth, op. cit., pp. 120-121. Concerning the treaty with Austria, the United States Secretary of State told the Austrian Chancellor "The terms of the Resolution with respect to participation of the United States in any agency or commission under the treaty of course relate merely to matters of domestic policy and procedures which are of no concern to the Austrian Government" (ibid., p. 120).

[696] See para. 384 above and the doctrinal commentary quoted in note 522.

[697] Quoted by William W. Bishop, Jr., op. cit., p. 318.

and do not affect Canada's rights or obligations under the treaty".[698] And, in the wake of an internal dispute in the United States, the District of Columbia Court of Appeals held that the problem was a purely domestic one which did not affect the treaty relations between the parties:

> "The reservation therefore made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did 'accept' the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest."[699]

512. In this case, the uselessness of the other party's acceptance of a declaration is explained by the fact that the statement was not really a reservation or an interpretative declaration.[700] One may wonder, however, what happens when the statement is a genuine interpretative declaration.

513. Here again, the main source of information available to the Special Rapporteur relates to the practice of the United States of America, which tends to indicate that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the Government making the statement or declaration to notify the other Government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto".[701]

514. And once the declaration has been approved, it becomes an integral part of the treaty:

> "... where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument ... and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged – the declaration thus annexed is part of the treaty and is as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged".[702]

515. It is difficult to argue with this reasoning, but it leads to two complementary questions:

(a) Must interpretative declarations which are made in respect of bilateral treaties, just like "reservations" to such treaties,[703] necessarily be accepted by the other party?

(b) If the answer to the first question is no, does the existence of an acceptance modify the legal nature of the interpretative declaration?

516. The answer to the first question is difficult. In practice, it seems that all interpretative declarations made by States prior to ratification of a bilateral treaty[704] have been accepted

---

[698] Ibid., p. 319. Compare this with the reaction cited earlier (para. 505) of the United Kingdom to the United States declaration concerning the 1986 Treaty.

[699] *Power Authority of the State of New York v. Federal Power Commission*, 247 F. (2d) 538 (1957), decision drafted by Circuit Judge Bazelon, quoted ibid., p. 321.

[700] See paras. 384-385 above.

[701] Marjorie M. Whiteman, op. cit., pp. 188-189.

[702] Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of 22 February 1819 (cited in para. 497 above), *Doe v. Braden*, 16 How. 635, 656 (US 1853), cited by William W. Bishop, Jr., op. cit., p. 316.

[703] See paras. 473-496 above.

[704] For examples of interpretative declarations made when signing a bilateral treaty, see Green Haywood Hackworth, op. cit., pp. 150-151, or note 681 above.

by the other contracting State.[705] However, this does not imply that their acceptance is required.[706]

517. In reality, this does not seem to be the case: in (virtually?) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because the formulating State[707] requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not[708] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition *sine qua non* of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.4. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on him, and in this case it is a "simple interpretative declaration", which, like those made in respect of multilateral treaties,[709] may actually be made at any time.

518. The fact remains that, when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,[710] it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it".[711] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,[712] exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.[713] It becomes an agreement collateral to the treaty which forms part of its context in the sense of paragraphs 2 and 3 (a) of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.[714] And this analysis is consistent with that of the United States Supreme Court in the *Doe* case.[715]

519. While he is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal

[705] See, however, the "serious fundamental objections" of Germany to the "reservations and understandings" of the United States of America concerning the Treaty on Commerce of 19 March 1925, mentioned in note 518 above.

[706] And the documentation available to the Special Rapporteur may well be incomplete.

[707] ILO did not specify whether or not that was the case with its interpretation (see note 564 above) of the 1990 Agreement with Zimbabwe (see note 564 above).

[708] See paras. 314-335 above.

[709] See paras. 336-348 above.

[710] And one can imagine that this would be the case even when an interpretative declaration is not conditional.

[711] Advisory Opinion of 6 December 1923, *Jaworzina* case, Series B, No. 8, p. 37.

[712] Exchange of letters, protocol, simple verbal agreement, etc.

[713] See para. 486 above and draft guideline 1.1.9, second subparagraph.

[714] Article 31 of the 1969 Convention reads: "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;".

[715] See para. 514 above.

regime, of reservations and interpretative declarations,[716] the Special Rapporteur suggests to the Commission that it be mentioned in a draft guideline. He does not in fact intend to return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties. If the Commission endorses this intention, there may not be another occasion on which to include such a reference.[717]

520. Bearing this in mind, it is suggested that the Commission adopt the following draft guideline:

> *"Guide to practice*
>
> *"1.2.8 The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to that treaty and accepted by the other party constitutes the authentic interpretation of the treaty."*

521. In the meantime, it would seem unnecessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these are governed by the same rules and the same criteria as interpretative declarations in respect of multilateral treaties.[718] The only exceptions are draft guidelines 1.2.1, on the joint formulation of interpretative declarations, and 1.2.3, on the formulation of an interpretative declaration when reservations are prohibited by the treaty, rules which cannot, obviously, be transposed to the case of bilateral treaties. It would therefore seem to suffice to state in the Guide to Practice:

> *"Guide to practice*
>
> *"1.2.7 Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral statements made in respect of bilateral treaties."*

Section 3. Alternatives to reservations (postponed)

522. In view of the length of the present report, the Special Rapporteur finds himself compelled to postpone this section of his fourth report. In it he proposes to present a brief account of the various procedures other than reservations by which States and international organizations may achieve the same objective as those pursued when making reservations, namely exclusion or modification of the legal effect of certain provisions of a treaty in their application to one or more of the parties to the treaty.

---

[716] See draft guideline 1.4.

[717] If necessary, the draft guideline could later be moved to a part of the Guide to Practice that seemed more appropriate.

[718] See in particular paras. 508, 509 and 517 above.

United Nations A/CN.4/491/Add.6

General Assembly

Distr.: General
19 July 1998
English
Original: French

International Law Commission
Fiftieth session
Geneva, 20 April–12 June 1998
New York, 27 July–14 August 1998

Third report on reservations to treaties

by Mr. Alain Pellet, Special Rapporteur

Addendum

Recapitulatory annex to the Guide to Practice

523. This annex recapitulates the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice in respect of reservations. The titles of the individual guidelines are proposed on a provisional basis.

GUIDE TO PRACTICE

1. DEFINITIONS

1.1 Definition of reservations

1.1 "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 Joint formulation of a reservation

The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.

98-21236 (e) 230798 240798

1.1.2 Moment when a reservation is formulated

A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

1.1.3 Reservations formulated when notifying territorial application

A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.

1.1.4 Object of reservations

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State intends to implement the treaty as a whole.

1.1.5 Statements designed to increase the obligations of their author

A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts], even if such a statement is made at the time of the expression by that State or that organization of its consent to be bound by the treaty.

1.1.6 Statements designed to limit the obligations of their author

A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty.

1.1.7 Reservations relating to non-recognition

A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.

1.1.8 Reservations having territorial scope

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation, regardless of the date on which it is made.

1.1.9 "Reservations" to bilateral treaties

A unilateral statement formulated by a State or an international organization after signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation, however phrased or named.

The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty, and both parties are bound by the new text once they have expressed their final consent to be bound.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

1.2.1 Joint formulation of interpretative declarations

The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations.

1.2.2 Phrasing and name

It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.2.3 Formulation of an interpretative declaration when a reservation is prohibited

When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation.

1.2.4 Conditional interpretative declarations

A unilateral declaration formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration [which has legal consequences distinct from those deriving from simple interpretative declarations].

1.2.5 General declarations of policy

A unilateral declaration formulated by a State or an international organization when that State or international organization expresses its consent to be bound which does not purport to exclude or modify the legal effect of the treaty in its application to that State or that international organization, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties].

1.2.6 Informative declarations

A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration.

1.2.7 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral declarations made in respect of bilateral treaties.

1.2.8 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.3 Distinction between reservations and interpretative declarations

[1.3.0 Criterion of reservations

The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.]

[1.3.0 *bis* Criterion of interpretative declarations

The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.]

[1.3.0 *ter* Criterion of conditional interpretative declarations

The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.]

1.3.1 Method of distinguishing between reservations and interpretative declarations

To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.

Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities.

1.4 Scope of definitions

Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition.